Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN D. SZABO, doing business as ZATRON, on behalf of himself and all others similarly situated,

Petitioner,

v.

BRIDGEPORT MACHINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), when a district court is satisfied that it has a sufficient record to determine that the requirements for class treatment under Rule 23 of the Federal Rules of Civil Procedure have been met, does it abuse its discretion if it assumes that the substantive allegations of the complaint are accurate and does not conduct a preliminary inquiry to resolve factual disputes that relate to the merits of the claims?

LIST OF PARTIES AND RULE 29.6 LIST

The petitioner is John D. Szabo, who does business under the trade name Zatron. Mr. Szabo sought to represent a class of all persons who purchased a computer numerically controlled milling machine or machining center from Bridgeport Machines, Inc. incorporating its proprietary DX-32 Control Unit after January 1, 1996.

The respondent is Bridgeport Machines, Inc. ("Bridgeport"). Bridgeport is a subsidiary of Goldman Industrial Group.

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PETITION FOR A WRIT OF CERTIORARI

John D. Szabo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals that gives rise to the question presented is reported as *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (CA7 2001), and is reproduced in the appendix. (App. at 1-11). The district court's opinion which the court of appeals vacated is reported as *Szabo v. Bridgeport Machines, Inc.*, 199 F.R.D. 280 (N.D. Ind. 2001), and is reproduced in the appendix. (App. at 12-49). The district court also issued an opinion denying the defendant's request that it reconsider its class certification order; this opinion is reported at *Szabo v. Bridgeport Machines, Inc.*, 199 F.R.D. 280, 296 (N.D. Ind. 2001), and is reproduced in the appendix. (App. at 50-61).

JURISDICTION

The judgment of the court of appeals was filed on May 4, 2001. (App. at 1). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions, 28 U.S.C. § 1292 and Rule 23 of the Federal Rules of Civil Procedure, are set forth in the appendix. (App. at 62-69).

STATEMENT OF THE CASE

The district court had jurisdiction under 28 U.S.C. § 1332, because of diversity of citizenship, as Mr. Szabo is a citizen of Indiana, Bridgeport is a Delaware corporation with its principal place of business in Connecticut, and the amount in controversy exceeded seventy-five thousand dollars.

This action arose from Mr. Szabo's purchase of a computer numerically controlled ("CNC") vertical machining center manufactured by the defendant, Bridgeport. A machining center is a CNC milling machine that incorporates a tool changer mechanism. CNC milling machines serve to shape parts precisely by instructing the machine to move a cutting tool across or through a metal part in accordance with a program designed for the specific part. CNC milling machines and machining centers offer improvements over manual machines in both the quality and quantity of the finished parts they produce, due to the computer control unit that directs the machine tool across or through metal parts. Mr. Szabo purchased a Bridgeport VMC 800 that was fitted with Bridgeport's proprietary DX-32 Control Unit. After working with the machine, Mr. Szabo learned that it could not operate at speeds consistent with Bridgeport's specifications without producing parts with a poor finish that resulted from

dwell marks. Dwell marks occur when the control unit is unable to properly calculate the acceleration and deceleration of the cutting tool and leaves the cutting tool in one place for too long. Mr. Szabo also had a variety of other problems with the machine that stemmed from its computer control unit, such as shutdowns and data errors.

The plaintiff filed his initial complaint in Allen County, Indiana on April 5, 2000, asserting claims for breach of express warranty, implied warranty, negligent misrepresentation and fraud on behalf of himself and a class of other purchasers of Bridgeport's CNC machines that incorporated the DX-32 Control Unit. Mr. Szabo's complaint premised his claims on a written brochure that he had received in advance of his purchase that provided many of the specifications for the machine, and on the form contract furnished by the local Bridgeport dealer, which also contained detailed performance specifications. Bridgeport removed the case to the United States District Court for the Northern District of Indiana, and moved to dismiss the fraud claim for lack of specificity. After the district court granted Bridgeport's motion, Szabo filed an amended complaint to address the district court's order on the motion to dismiss. The amended complaint again premised Mr. Szabo's claims on the brochure and on the form contract, not oral statements.

On August 16, 2000, while a second motion to dismiss was pending, plaintiff moved to certify the case as a

class action.[1] Relying on Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, Mr. Szabo's motion asked the district court to certify a class of "all persons who purchased a machining center or a CNC milling machine from the defendant that included a Bridgeport DX-32 Control Unit between January 1, 1996 and the present and were damaged thereby." (Mot. for Class Action Certification ¶ 1). The class motion was supported by a declaration from his counsel authenticating documents exchanged in discovery. (Declaration of James R. Malone, Jr. in Support of Motion for Class Action Certification ("Malone Decl.")).[2] In his initial brief in support of his class motion, Mr. Szabo highlighted two central issues: he argued that common questions predominated over individual issues because the case revolved around the use of common documents (the promotional brochures and form sales contracts), and he asserted that a nationwide class was manageable because of the likelihood that a single state's law would apply to all class members' claims under Indiana's choice of law principles.

With its opposition to the class motion, Bridgeport included some documentary exhibits and an affidavit that Mr. Szabo moved to strike. Bridgeport did not move to

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[1] At the first conference in the case, a scheduling order was entered setting the deadline for this motion as August 17, 2000.

[2] To provide some understanding of the nature of the material before the district court on the class certification motion, certain of these items are reproduced in the appendix. (App. at 70-96).

strike any of plaintiff's documentary exhibits.[3] The defendant asserted that none of Rule 23's criteria were met, arguing that the class was not numerous, that no common questions existed and that the plaintiff was neither typical of other class members nor adequate to represent them. On the central issues plaintiff had highlighted in his opening brief, Bridgeport asserted that the case was really one that involved oral misrepresentations by the local dealer, not reliance on written representations; defendant also argued that a class action could not be managed because each class member's claims would be governed by the law of the state in which he resided. Although the district court's rules required a party who sought an evidentiary hearing to file a written request, Bridgeport requested neither oral argument nor a hearing.[4] Plaintiff submitted a reply declaration with additional evidentiary materials and a reply memorandum addressing Bridgeport's arguments. Before ruling on the class motion or the pending motion to dismiss, the district court entered an order directing that the parties file

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[3] Most lower courts hold that a party must move to strike evidentiary submissions on pretrial motions or waive any objection to their consideration. *See In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 437 n.12 (CA3 1996) (failure to challenge sufficiency of summary judgment affidavit through a motion to strike waives defects); *Humane Soc. of The United States v. Babbitt*, 46 F.3d 93, 96 n.5 (CADC 1995) (same); *DeCintio v. West Chester County Medical Center*, 821 F.2d 111, 114 (CA2 1987) (same). The Seventh Circuit has long followed this approach. *See Klingman v. National Indemnity Co.*, 317 F.2d 850, 854 (CA7 1963).

[4] N.D. Ind. R. 7.5 requires parties seeking an evidentiary hearing to file a request and also requires a written request from a party who seeks oral argument on a motion.

memoranda on choice of law issues and that they address certain specific questions. Three additional briefs were filed following this order.

With the conclusion of these submissions, the district court had before it nine different briefs on the two pending motions and a variety of evidentiary materials, such as interrogatory responses, the plaintiff's deposition, and a number of documents relevant to the dispute. The documents included a memorandum dated June 17, 1996, in which the Company was advised that its VMC 760 vertical machining center equipped with the DX-32 Control Unit was only capable of handling complex machining at a rate dramatically lower than a competing machining center and that increasing to a higher speed caused it to "bump and shudder" (App. at 77-78); a July 2, 1996 internal memorandum to Marvin Kreithen, Vice President and General Manager of Bridgeport's facility that was responsible for the design, development and manufacturing of the DX-32 Control Unit, which inquired on the status of the "dwell mark project" and indicated that customers were "anxiously awaiting a reply" (App. at 79); and a July 2, 1996, e-mail sent to Marvin Kreithen and Dan Griffith, Bridgeport's chief executive officer, which stated that Bridgeport would need to take back "two more" DX-32 equipped machining centers because they created dwell marks, which did not occur on the customer's other Bridgeport units that did not have the DX-32 control (App. at 80).

The materials that Mr. Szabo submitted also included an e-mail dated July 14, 1998, from a Bridgeport distributor in California to Bridgeport's chief executive reporting on problems experienced with Bridgeport's Torq-Cut

machining centers that were equipped with the DX-32 Control Unit. The e-mail noted that customers had complained about jolting and bumping motions and about dwell marks and indicated that the distributor had replicated these problems in its own test of DX-32 equipped machines. The distributor reported that the same problems did not occur on Torq-Cut models that used a different control unit. (App. at 71-73). Szabo also submitted an August 1998 exchange of e-mails between Marvin Kreithen and Dan Griffith in which Kreithen commented on difficulties which the DX-32 Control Unit had in handling acceleration and deceleration, and Griffith responded that "you and I both know that this problem has plagued us for the last 2.5 years and we have been only marginally able to improve the situation." (App. at 74-76). In addition, Szabo provided the district court with an internal Bridgeport memorandum transmitting form contracts to its dealers and indicating that these contracts would be maintained on a computer bulletin board for their use (App. at 81-89), and he furnished an internal Bridgeport memorandum that demonstrated that the same control software for the DX-32 Control Unit was used on a variety of different machines. (App. at 90-96).

Against this background, on January 12, 2001, the district court issued its ruling on class certification.[5] The court reviewed each of the relevant criteria under Rule

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[5] In the same opinion in which it granted plaintiff's motion for class certification, the court also denied Bridgeport's renewed motion to dismiss. It declined to rule on the motion Mr. Szabo had filed to strike the affidavits defendant submitted, determining that it was moot.

23. First, the court held that Szabo's estimate that hundreds of class members existed, which had been derived from Bridgeport's SEC filings, was sufficient to meet the numerosity requirement of Rule 23(a)(1), particularly in the absence of any evidentiary showing to the contrary from Bridgeport. (App. at 18-19). Next, the district court also found that common questions of law or fact were presented as required by Rule 23(a)(2). (App. at 20). In addressing the typicality requirement of Rule 23(a)(3), the court outlined the conflicting positions of the parties on what the case involved:

> Szabo argues that he is a typical victim of the defendant's practices and that his claims arise out of the same course of conduct and are based on the same legal theories as those of the putative Class members. Szabo notes that the gravamen of his claims is that the DX-32 Control Unit was defective. Szabo alleges that Bridgeport marketed its CNC machines equipped with the control unit as state-of-the-art and capable of certain performance specifications. (Am. Comp. ¶¶ 1, 16-17, 27-29, 34-38, 43). Szabo also claims that Bridgeport was aware that the DX-32 Control Unit had numerous, severe defects. (Am. Comp. ¶¶ 1, 26, 60-72, 97-98, 105). Szabo alleges in his complaint that the defects in the DX-32 were inherent, and therefore present in every CNC milling machine and vertical machining center that incorporated that unit. (Am. Comp. ¶¶ 26, 60-71, 92). Allegedly, there were problems with acceleration and deceleration which were common to all machines equipped with the DX-32. (Am. Comp. ¶¶ 68, 71). The complaint specifically alleges that many of the problems with the machine

> have been attributed to problems with the software, which is an inherent defect in the machine. (Am. Comp. ¶¶ 48, 53, 56, 58-59, 69-71). Szabo also alleges that Bridgeport had knowledge of the defects in its products. (Am. Comp. ¶¶ 1, 26, 60-71). The complaint describes numerous complaints by other purchasers of the DX-32 who experienced the same problems as Szabo with their machines. (Am. Comp. ¶¶ 26, 55, 60-71). In light of all the above allegations, Szabo concludes that the common issues in this case are central to his claim and that by litigating the liability issues he can reasonably be expected to advance the interests of all putative Class members in a favorable determination on each common issue. *Weiss v. York Hospital*, 745 F.2d 786, 809-10 n. 36 (3rd Cir. 1984).
>
> Bridgeport, in response, contends that Szabo's claim is inherently dependent upon his unique factual circumstances and, therefore, common factual issues do not predominate. Bridgeport relies on Szabo's deposition, wherein he indicated that numerous oral representations were made to him by Bridgeport's alleged agent (Advanced Machinery), as well as a demonstration of the product. Bridgeport then concludes that Szabo's claim is one based on oral misrepresentations, which oral misrepresentations would be different for each potential Class member, and, therefore, class certification is not permissible.

(App. at 21-23). While obviously cognizant of the parties' differing views of the case, the district court concluded that it was not proper for it to make a determination of the ultimate facts in ruling on the class certification motion:

> Clearly, Bridgeport is forgetting that this court must accept the substantive allegations of Szabo's complaint as true. *In re Synthroid Mktg. Litig.*, 188 F.R.D. 287, 290 (N.D. Ill. 1999). While Bridgeport is free to argue during the merits phase of the case that Szabo cannot base his claim on written materials he received, such an argument has no place in response to a motion to certify class. In any event, the law is clear that the presence of some oral misrepresentations does not preclude class treatment. *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 188 (N.D. Ill. 1992) ("simply because oral misrepresentations exist denial of class certification is not automatic."); *Riordan v. Smith Barney*, 113 F.R.D. 60, 63 (N.D. Ill. 1986) (mere fact that some oral misrepresentations were made does not preclude certification).

(App. at 23).

The district court held that common issues of fact predominated given the common documents that were central to the plaintiff's claims. (App. at 23-28). After concluding that Mr. Szabo was an adequate class representative and that the size of the plaintiff's damage claim did not preclude class treatment, the district court turned to a discussion of choice of law, which was relevant to whether a class action would be manageable and would be superior to other alternatives.

The district court commenced its choice of law analysis by reviewing the parties' contentions on the relevant state contacts. While Mr. Szabo acknowledged that Indiana had contacts with his claims, since he resided there, the injury arose there and the suit was pending there, he asserted that Connecticut had more significant contacts

with the case because its contacts were directly related to the wrongful acts alleged. (App. at 36). Bridgeport contested Mr. Szabo's assertion that Indiana's contacts were insignificant, and argued that "if the state in which the last event giving rise to liability also has other contacts with the suit, and the suit was filed in that state, that state's law should apply." (App. at 37). Much of Bridgeport's choice of law analysis again rested on the premise that the plaintiff's claim depended on oral representations, rather than the written statements in Bridgeport's promotional brochure and form contract. To resolve the parties' dispute over the relative significance of particular state contacts, the district court focused on decisions of the Indiana appellate courts. The district court treated one case, *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283 (Ind. App. 1998), at length, since it involved a class action suit in which wrongful acts in one state were relied upon by class members residing in Indiana, where the suit was ultimately filed. (App. at 38-39). Based upon its analysis of Indiana case law, the court concluded that Connecticut had more significant connections with the case:

> While it is true that Szabo is an Indiana resident and the machine he purchased is located in Indiana, the court finds these to be insignificant contacts with respect to the current action. Szabo's allegations against Bridgeport concentrate on Bridgeport's action and representations made in Connecticut. Therefore, Indiana's contacts are of inconsequential significance.

(App. at 40).

Although the defendant would later contend that the court had "blindly" relied on Szabo's allegations despite contrary evidence, the district court's opinion demonstrated that it had carefully assessed the record before it:

> Szabo has also supplemented the allegations of his complaint with documents produced in discovery that show that Bridgeport maintained standardized form contracts on a computerized bulletin board for the use of its dealers, and that the terms of those standardized contracts match the terms of the contract for sale that Szabo received. Szabo has also relied upon Bridgeport's agreement with its local dealer to support his contention that the contract which he signed for the purchase was approved by the defendant in Bridgeport, Connecticut.
>
> Szabo further relies upon these materials to demonstrate that Bridgeport drafted the terms of the contract that documented Szabo's purchase of his machinery center. Szabo points out that this document, along with the brochure he received, form the basis of his claims for fraud, negligent misrepresentation and breach of warranty. Additionally, with respect to oral statements made to Szabo by representatives of Advance Machinery, Szabo notes that nothing in the record indicates that the oral statements made to him did anything more than reinforce the statements made in the promotional brochure concerning the specifications for the machine, and similar statements in the quotation that ultimately served as the documentation for Szabo's purchase.[6]

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[6] In fact, Szabo's deposition testimony stated that he had "exhaustively" reviewed Bridgeport's promotional brochure and "decided to buy [the machine] based on what was in the

(App. at 40-41). Concluding that Connecticut law would apply to all class members' claims under Indiana's choice of law principles, the district court granted the class certification motion.

Bridgeport subsequently moved for reconsideration. The motion faulted the district court for not holding an evidentiary hearing, but Bridgeport still did not request a hearing. Bridgeport criticized the district court for "blindly" accepting the allegations in the complaint as true, and for not looking beyond the allegations in determining whether the proposed class meets the requirements of Rule 23. An additional three briefs were filed with the court.[7] The district court denied defendant's

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brochure." (Reply Decl. of James R. Malone, Jr., Ex. 21 at 139:5-10). He also studied the form contract. (*Id.*). While Bridgeport continuously asserted that individual representations to Mr. Szabo made his circumstances unique, he testified that the focus of his dealings with the local Bridgeport dealer was on the specifications contained in Bridgeport's promotional brochure:

Q: Okay. I asked you about representations made to you by Steve or somebody else at that demonstration.

A: Okay. Steve gave me the brochure and we went over the brochure together.

(*Id.*, Ex. 21 at 96:20-23). Szabo's interrogatory responses also indicated that the focus of the discussion was on the performance specifications set forth in Bridgeport's brochure at the demonstration. (*Id.*, Ex. 23 at 7). Moreover, as Mr. Szabo explained to the district court, any oral representations that were inconsistent with the promotional brochure and the written contract would not be actionable.

[7] Plaintiff filed a motion to strike an affidavit that Bridgeport submitted with the reconsideration motion along with his opposition to the motion for reconsideration.

motion on March 1, 2001. (App at 50). In denying the reconsideration motion, the district court commented on the standard of review for class certification motions:

> It is clear (as this court acknowledged in its order of January 12, 2001), that it is sometimes appropriate for a court to "probe behind the pleadings" when making a decision on class certification. However, this is not to say that such a probing is required in every case in which Rule 23 certification is contested (which would be virtually every Rule 23 motion), or that such probing involves deciding contested issues of fact that go to the heart of the plaintiffs' claims.

(App. at 59). In a footnote, the district court expanded on the point:

> The court fully realizes, however, that it is not barred from examining the issues involved in the litigation in order to determine whether to certify a class. *See Elliott v. ITT Corp.*, 150 F.R.D. 569, 572 (N.D. Ill. 1992) (although court cannot consider arguments on the merits, court should consider substantive elements of plaintiff's claims and proof necessary to those elements so as to envision form trial would take). In the present case, the issues were fully examined in the parties' numerous briefs and this court's thirty-one page order.

(App. at 59-60). The district court also commented upon the sufficiency of the record:

> In the present case, Szabo's extensive complaint contains excruciating detail, including specific quotations from internal communications among defendant's employees discussing the

> problems experienced with machines equipped with the DX-32 Control Unit. Additionally, the court had before it Szabo's deposition transcript, his interrogatory responses (which exceeded 60 pages in length), and a variety of Bridgeport's own documents.

(App. at 59-60).

Following a petition for review of the class certification order (which Szabo opposed), on May 4, 2001, the United States Court of Appeals for the Seventh Circuit summarily vacated the district court's class certification order, simultaneously granting leave to appeal and disposing of the appeal on the merits without substantive briefs or an opportunity to review the record before the district court. The Seventh Circuit held that the district court had erred in accepting the allegations of the plaintiff's complaint:

> The district judge recognized that the request for class certification presented difficult problems, and that on key points Szabo's position had been contested. Szabo asserts, for example, that all oral representations by all Bridgeport distributors everywhere have been either authorized or ratified by Bridgeport itself;[8] Bridgeport contends that this is untrue. Resolution of this dispute is vital to any sensible decision about class certification. Szabo contends that the DX-32 unit is unsuited to any

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[8] Here, the Court of Appeals misspoke, for Szabo's position was that Bridgeport's written statements presented issues which predominated over any individual issues, and Bridgeport's written representations, not oral statements, formed the basis of his suit.

> machine tool with which it may be mated; Bridgeport contends that its operation depends at least in part on the tool it is controlling. Again the propriety of a class comprising all buyers of all machine tools that include DX-32 control units depends on the outcome of this disagreement. There are other important disputes that we need not discuss, for the district court handled all of them in the same way: the judge assumed that whatever Szabo alleges must be true.

(App. at 3-4). Reasoning that the practice of accepting the truth of the substantive allegations of the complaint had "little to recommend it" (App. at 6), the Seventh Circuit held that if disputed factual issues relate to both Rule 23's criteria and the merits of the claims, the district court "must make a preliminary inquiry into the merits." (App. at 7-8). Without pausing to examine the record before the district court, the Seventh Circuit concluded that the district court had abused its discretion, vacated its class certification order and remanded the matter for further proceedings.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE EXISTING CONFLICTS AMONG THE COURTS OF APPEALS ON THE SCOPE OF THE INQUIRY TO BE CONDUCTED IN DETERMINING WHETHER CLASS TREATMENT IS WARRANTED

Under Rule 23(c)(1), district courts are directed to determine whether cases brought as proposed class

actions warrant class treatment, "as soon as practicable."[9] Fed. R. Civ. P. 23(c)(1). The rule also authorizes district courts to enter a conditional certification order and to modify the class order prior to decision on the merits. *Id.* In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this Court commented that "nothing in either the language or history of Rule 23 gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177; *but see Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (CA7 1999) ("one of the fundamental unanswered questions [under Rule 23] is whether judges should be influenced by their tentative views of the merits when deciding whether to certify a class").

Since the propriety of class treatment should be addressed promptly and the class determination should not involve an inquiry into the merits, many lower courts proceed by assuming the truth of the substantive allegations of the complaint and reviewing other material that is available to assess whether class treatment is warranted. *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (CA9 1975). As the Ninth Circuit explained:

> [T]he judge may not conditionally certify an improper class on the basis of a speculative possibility that it may later meet the requirements. However, neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the

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[9] In implementing this principle, a number of district courts have enacted local rules directing that a class motion be filed by a specific time, which is frequently quite short. *See Manual for Complex Litigation (Third)* § 30.11 at 213 (1995).

> suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies the Rule. The district judge is required . . . to determine "as soon as practicable after the commencement of an action brought as a class action . . . whether it is to be so maintained." The Court made clear in *Eisen IV* that that determination does not permit or require a preliminary inquiry into the merits, thus the district judge is necessarily bound to some degree of speculation by the uncertain state of the record on which he must rule. An extensive evidentiary showing . . . is not required. So long as he has sufficient material before him to determine the nature of the allegations, and rule on compliance with the Rule's requirements, and he bases his ruling on that material, his approach cannot be faulted because plaintiffs' proof may fail at trial.

524 F.2d at 901 (citations omitted).[10] Similarly, in *General Telephone Co. v. Falcon,* 457 U.S. 147 (1982), this Court emphasized that district courts retained flexibility in making the determination of whether class treatment was appropriate:

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[10] *See generally Manual for Complex Litigation (Third),* § 3.11 at 214 (1995) ("to decide issues of commonality and typicality, [the trial court] will generally need to have a clear understanding of the nature of the claims and defenses, and at least a general understanding of the relevant facts and applicable substantive law. Although the court should not at this stage assess the relative merits of the underlying claim(s), these determinations cannot always be made on the bare allegations of pleadings and some discovery may be needed.") (footnotes omitted).

> Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation. For such an order, particularly during the period before any notice is sent to members of the class, "is inherently tentative." This flexibility enhances the usefulness of the class action device; actual, not presumed, conformance with Rule 23(a) remains, however, indispensable.

457 U.S. at 160 (footnote and citations omitted). Against this background, the Seventh Circuit's decision raises basic questions concerning the standards district courts should apply in evaluating the propriety of class treatment and the scope of the inquiry that they should conduct. In this case, the Seventh Circuit held that the district court abused its discretion because it did not resolve central factual issues relating to the merits that were disputed by the parties. Coupled with its directive that the district court cannot assume the accuracy of the substantive allegations of the complaint in any case where the defendant contests them, the effect of the decision below is to call for a broad-ranging inquiry into the evidence in nearly all class action cases.

A.

This Court should grant the writ because the Seventh Circuit's decision conflicts with the holdings of several circuits directing district courts to assume the truth of the substantive allegations of the plaintiff's complaint in assessing whether class treatment is warranted. In this case, the Seventh Circuit has held that "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it," and has directed district courts to make preliminary inquiries into the merits to resolve class issues. (App. at 6, 7-8).

The Seventh Circuit's holding directly conflicts with existing precedent from the Second, Ninth and Tenth Circuits holding that the district court should accept the substantive allegations of the complaint as true in assessing the propriety of class treatment. *See J.B. v. Valdez*, 186 F.3d 1280, 1290 n.7 (CA10 1999); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (CA9 1984); *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 660 n.15 (CA2 1978); *Green v. Wolf Corp.*, 406 F.2d 291, 294 n.1 (CA2 1968); *see also Blackie v. Barrack*, 524 F.2d at 901 n.17. These courts view the acceptance of the allegations of the complaint as a necessary corollary to the principle that the class action determination should not devolve into a preliminary hearing on the relative merits of the plaintiff's claims. As the Second Circuit has explained:

> As to appellants' argument that the trial court should not have decided the class motion on the basis of the complaint, we simply note

> that Judge Frankel was prohibited from conducting an inquiry into the merits by the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin;* that he did consider the criminal information and numerous affidavits and documents relating to the class issues; and we have previously held that it is proper to accept the complaint allegations as true in a class certification motion.

Shelter Realty, 574 F.2d at 661 n.15 (citations omitted). While these courts have ruled that the district court should accept the substantive allegations of the complaint, they also recognize the ability of district courts to evaluate other material to assess the issues surrounding class certification. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 691 F.2d at 1342 ("Although, in deciding whether to certify the class, the district court is bound to take the substantive allegations as true, the court also is required to consider the nature and range of proof necessary to establish these allegations.") (citations omitted); *see also J.B. v. Valdez,* 186 F.3d at 1290 n.7 (court not bound to accept conclusory allegations that simply track Rule 23); *Shelter Realty,* 574 F.2d at 661 n.15 (district court's certification order properly rested on acceptance of allegations of the complaint and review of other materials). Here, of course, the district court engaged in precisely the type of inquiry that these circuits consider appropriate, accepting the allegations of the complaint, reviewing supplementary materials,

analyzing the issues presented and applying the criteria of Rule 23.[11]

This approach to class certification motions is inherently consistent with this Court's decision in *Falcon*: "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." 457 U.S. at 160.

Of course, to the extent that the Second, Ninth and Tenth Circuits have correctly construed *Eisen* to preclude a preliminary inquiry into the merits of a case to decide class certification issues, the Seventh Circuit's holding that the district court should have done so directly conflicts with *Eisen* as well.

B.

Granting the writ will also give this Court an opportunity to resolve an existing split among the courts of appeals on the extent to which an evidentiary hearing is required in determining whether class treatment is warranted. The need for an evidentiary hearing to address

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[11] The district court's refusal to accept the defendant's efforts to recast plaintiff's complaint from an action based on Bridgeport's written representations in its promotional literature and form contract into a suit based upon vague and nebulous statements of its local salesman also comported with the principle that "the plaintiff is the master of the complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987) (discussing principle in context of subject matter jurisdiction).

the propriety of class treatment is directly implicated by the Seventh Circuit's holding that a district court should hold a preliminary inquiry into the merits whenever disputed factual issues implicate both the merits and the propriety of class treatment. At present, there are three basic approaches that prevail among the circuits on the need for an evidentiary hearing to resolve class issues.

The Second Circuit has held that an evidentiary hearing may be required if the trial court is inclined to *deny* class treatment: "While evidentiary hearings are not mandated in every Rule 23 case, a denial of class certification should not ordinarily be made without giving the plaintiffs an evidentiary opportunity, if requested." *Marcera v. Chinlund*, 565 F.2d 253, 255 (CA2 1977) (citations omitted).

The Fifth Circuit has held that "ordinarily, it is the duty of the trial court to hold an evidentiary hearing before deciding whether to grant or deny class certification." *King v. Gulf Oil Co.*, 581 F.2d 1184, 1186 (CA5 1978) (citations omitted); *see also Shepard v. Beaird-Poulan, Inc.*, 617 F.2d 87, 89 (CA5 1980). The Eleventh Circuit follows the same approach. *Morrison v. Booth*, 730 F.2d 642, 643 (CA11 1984).[12]

The remaining circuits that have addressed the question have left the matter to the sound discretion of the district court. *See In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (CA6 1996) ("Although a hearing prior to

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[12] The failure of the district court to conduct such a hearing may nonetheless be excused as harmless error in these circuits. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1099 (CA11 1996); *Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 609 (CA5 1986).

the class determination is not always required, 'it may be necessary for the court to probe behind the pleadings. . . . ' ") (*quoting Falcon*); *Fink v. National Svgs. & Trust Co.*, 772 F.2d 951, 961 (CADC 1985) ("There is no explicit requirement in this Circuit that a District Court grant a hearing or provide findings on the class issue. . . . "); *id.* at 964 (Scalia, J., dissenting) (same); *Int'l Paperworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (CA4 1981) ("It is not essential to the resolution of every class certification motion that the trial court conduct a hearing. . . . "); *Lamphere v. Brown Univ.*, 553 F.2d 714, 718 (CA1 1977) (no authority to establish that "the district court must, as general practice, hold an evidentiary hearing before granting class status").

This was the position of the Seventh Circuit historically: "In certain circumstances, an evidentiary hearing *may* be necessary for full evaluation of the class issue. *But we do not believe that an absolute rule is necessary* to insure full explication of the class issue. . . . " *Simer v. Rios*, 661 F.2d 655, 671 (CA7 1981) (emphasis supplied). Now, however, district courts in that circuit are precluded from accepting the substantive allegations of the complaint in assessing class motions and are directed to conduct a preliminary inquiry into the merits of the case whenever the propriety of class treatment rests to some extent on contested factual issues. This effectively creates a universal hearing requirement, since "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiffs' cause of action.' " *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (*quoting Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). And as the district court

observed, issues are disputed by the parties on "virtually every Rule 23 motion."

C.

This Court should grant the writ because the question presented is an important one. By directing district courts to resolve factual disputes through a preliminary hearing on the merits, the Seventh Circuit created a new procedure that potentially threatens the jury trial rights of both class plaintiffs and defendants. And by effectively imposing a universal hearing requirement on district courts, the court of appeals has added significant additional burdens to district courts. Both points are illustrated by the efforts of the district court to carry out the directive of the Seventh Circuit that it resolve disputed factual issues.

After the court of appeals vacated the class certification order, the district court promptly scheduled a conference to discuss with the parties how to proceed on the class issues in light of the appellate mandate. Mr. Szabo's counsel indicated that an evidentiary hearing on class issues was apparently necessary under the Seventh Circuit's decision, and the court concluded that a bench trial to address class issues was the appropriate way to proceed.[13] Following submission by the parties of a new case management plan to accommodate this procedure, the

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[13] Ironically, Bridgeport, which had urged reversal because there had been no evidentiary hearing, took the position at the conference that the district court should simply accept its interpretation of the facts without further proceedings and deny class certification.

district court has now scheduled a bench trial for April 29, 2002, with the broad-ranging inquiry called for by the court of appeals presently estimated to take up to five days. Much of the same evidence will undoubtedly be presented a second time when the case is tried on the merits.

It remains to be seen how far into the merits the district court should inquire to carry out the Seventh Circuit's mandate that any contested issues of fact that "overlap" both class issues and the merits be resolved. In the past, this Court has directed lower courts to avoid fact-finding that would interfere with a party's right to trial by jury. Where legal and equitable claims arise from a common set of facts, district courts are directed to defer determination of the equitable claims pending the jury's resolution of the legal claims. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). Yet here the district court is directed to "resolve factual disputes" where Rule 23's criteria "overlap the merits." The Seventh Circuit's directive that district courts conduct a preliminary inquiry into the merits whenever Rule 23 criteria overlap with the merits thus creates a serious risk that findings will be entered at the class certification stage that will preclude one of the parties from presenting its claims or defenses to the jury.[14]

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[14] Although not specifically addressing jury trial issues, in *Eisen* this Court expressed concern that a preliminary inquiry into the merits could potentially prejudice the interests of a defendant because findings would be made by the court without the use of customary trial procedures. 417 U.S. at 178. The same risk of prejudice exists for both plaintiffs and

And the preliminary inquiry into the merits called for by the Seventh Circuit adds significantly to the burdens of federal trial courts. Since Rule 23's criteria are "enmeshed" with the merits, *Coopers & Lybrand v. Livesay*, 437 U.S. at 469, preliminary inquiries will of necessity be both routine and extended. This approach to determining whether class treatment is appropriate is inconsistent with "the economy and efficiency which is a principal purpose of the procedure." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974). The Seventh Circuit's directive that district courts conduct a preliminary inquiry into the merits whenever Rule 23's criteria overlap the merits is also "directly contrary" to the requirement that the propriety of class treatment be addressed "as soon as practicable." *Eisen*, 417 U.S. at 178.

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defendants under the procedure called for by the Seventh Circuit.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

John D. Szabo, doing business as Zatron, Plaintiff-Appellee, v. Bridgeport Machines, Inc., Defendant-Appellant.
No. 01-8003

249 F.3d 672; 2001 U.S. App. LEXIS 8474

April 4, 2001, Submitted
May 4, 2001, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. No. 1:00cv200. William C. Lee, Chief Judge.

DISPOSITION: Vacated and remanded.

COUNSEL: For BRIDGEPORT MACHINES, INCORPORATED, Petitioner: Robert D. Moreland, Submitted, BAKER & DANIELS, Fort Wayne, IN USA. Mark S. Baldwin, BROWN, RUDNICK, FREED & GESMER, Hartford, CT USA.

For JOHN D. SZABO, Respondent: Nicholas E. Chimicles, GREENFIELD & CHIMICLES, [sic] Haverford, PA USA. Richard P. Myers, PAUL, REICH & MYERS, Philadelphia, PA. Neal Lewis, LEWIS & ASSOCIATES, Orland, IN USA.

JUDGES: Before Posner, Easterbrook, and Williams, Circuit Judges.

OPINION BY: Easterbrook, Circuit Judge.

OPINION: Easterbrook, Circuit Judge. The district court has certified a nationwide class of all persons who since the beginning of 1996 have bought machine tools that

include a "DX-32 Control Unit" manufactured by *Bridgeport Machines. 199 F.R.D. 280, 2001 U.S. Dist. LEXIS 308* (N.D. Ind. Jan. 12, 2001). The DX-32 unit combines computer hardware and software to direct machine tools in performing complex tasks, such as milling metal in three dimensions. Plaintiff John Szabo believes that all DX-32 units sold during the past five years are defective and that Bridgeport (or its agents) also committed fraud in describing to customers the abilities (and limitations) of milling machines equipped with DX-32 units. According to Szabo the class contains "hundreds" of customers, and the complaint seeks more than $100,000 from Bridgeport in damages for each. Bridgeport has filed a petition under Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5 asking us to review the district court's order certifying the class.

A nationwide class in what is fundamentally a breach-of-warranty action, coupled with a claim of fraud, poses serious problems about choice of law, the manageability of the suit, and thus the propriety of class certification. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). The warranty action is itself governed by Connecticut law, as each contract provides. (Connecticut is Bridgeport Machines' home state.) But claims for fraud and negligent misrepresentation may depend on who made the representations, where, and on whose behalf. Most of the machine tools apparently were sold, and the representations in question made, by Bridgeport's distributors rather than by Bridgeport's own employees. Were these representations made with Bridgeport's approval (or knowledge)? If so, then Connecticut law might apply across the board (as the district

court concluded), but if not then the applicable law likely would be supplied by the state in which the statements were made. Connecticut law recognizes negligent misrepresentation as a distinct tort. *D'Ulisse-Cupo v. Notre Dame High School*, 202 Conn. 206, 520 A.2d 217, 223-25 (Conn. 1987). Indiana, where Szabo purchased and uses his milling machine, does not. *Darst v. Illinois Farmers Insurance Co.*, 716 N.E.2d 579, 584 (Ind. App. 1999). States also differ substantially in their willingness to permit buyers of commercial products to recover in tort for defects that are covered by warranties. Compare *GTE Mobilnet of South Texas LP v. Telecell Cellular, Inc.*, 955 S.W.2d 286 (Tex. App. 1997), with *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 142 F.3d 367 (7th Cir. 1998) (Indiana law). Differences of this kind cut strongly against nationwide classes, as we held in Rhone-Poulenc Rorer. Moreover, oral representations may vary substantially from one dealer (or occasion) to another, destroying the commonality of the claims. See, e.g., *Nagel v. ADM Investor Services, Inc.*, 65 F. Supp. 2d 740, 746 (N.D. Ill. 1999), affirmed, 217 F.3d 436 (7th Cir. 2000). To top this off, the DX-32 control units may work differently in different machine tools, and they may do well for some kinds of work (with a given tool) even if they are unsuited to others. These and other potential sources of variation account for the fact that few warranty cases ever have been certified as class actions – let alone as nationwide classes, with the additional choice-of-law problems that complicate such a venture.

The district judge recognized that the request for class certification presented difficult problems, and that on key points Szabo's position had been contested. Szabo asserts, for example, that all oral representations by all

Bridgeport distributors everywhere have been either authorized or ratified by Bridgeport itself; Bridgeport contends that this is untrue. Resolution of this dispute is vital to any sensible decision about class certification. Szabo contends that the DX-32 unit is unsuited to any machine tool with which it may be mated; Bridgeport contends that its operation depends at least in part on the tool it is controlling. Again the propriety of a class comprising all buyers of all machine tools that include DX-32 control units depends on the outcome of this disagreement. There are other important disputes that we need not discuss, for the district court handled all of them in the same way: the judge assumed that whatever Szabo alleges must be true. Proceeding as if class certification under Rule 23 were governed by the same principles as evaluating the sufficiency of the complaint under Rule 12(b)(6), the district judge stated:

> since the class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion. *In re Synthroid Marketing Litig.*, 188 F.R.D. 287, 290 (N.D. Ill. 1999); *Jefferson v. Security Pacific Financial Svcs., Inc.*, 161 F.R.D. 63, 66 (N.D. Ill. 1995).

199 F.R.D. 280, 2001 U.S. Dist. LEXIS 308 at *7. The opinion contains several variations on the same theme, such as:

> Bridgeport relies on Szabo's deposition, wherein he indicated that numerous oral representations were made to him by Bridgeport's alleged agent (Advanced Machinery), as well as a demonstration of the product. Bridgeport then concludes that Szabo's claim is one based on

oral misrepresentations, which oral misrepresentations would be different for each potential Class member, and, therefore, class certification is not permissible. Clearly, Bridgeport is forgetting that this court must accept the substantive allegations of Szabo's complaint as true. *In re Synthroid Mktg. Litig.*, 188 F.R.D. 287, 290 (N.D. Ill. 1999). 2001 U.S. Dist. LEXIS at *15. And this passage:

> [The court follows] the principle that, in ruling on a class certification, the question is 'whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23. . . . ' *Eggleston v. Chicago Journeymen Plumbers' Local No. 130*, 657 F.2d 890, 895 (7th Cir. 1981) (emphasis added). . . . Bridgeport is not permitted, at this stage, to contest the validity of [Szabo's] theory that the local dealer with whom [Szabo] dealt was Bridgeport's agent.

2001 U.S. Dist. LEXIS at *40. In sum, the district judge certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment. The judge stated that he had no other option.

For two reasons, we have granted Bridgeport's request for discretionary appellate review under Rule 23(f). First, the class certification turns a $200,000 dispute (the amount that Szabo claims as damages) into a $200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement even if the customers' position is weak. This is a prime occasion for the use of Rule 23(f), not only because of the pressure that class certification places on the defendant but also because the ensuing

settlement prevents resolution of the underlying issues. See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). Accepting an appeal in a big-stakes case is especially appropriate when the district court's decision is problematic, as it is here. Second, the district court's decision to certify the class implies that important legal principles have evaded attention by appellate courts. *Id. at 835.* At critical junctures the district judge cited only decisions by other district judges, most in cases later settled and thus not subject to appellate consideration. By granting review now, we can consider whether these cases correctly understood the applicable principles.

Which, we hold, they did not. The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it. The reason why judges accept a complaint's factual allegations when ruling on motions to dismiss under Rule 12(b)(6) is that a motion to dismiss tests the legal sufficiency of a pleading. Its factual sufficiency will be tested later – by a motion for summary judgment under Rule 56, and if necessary by trial. By contrast, an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional). Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23. This would be plain enough if, for example, the plaintiff alleged that the class had

10,000 members, making it too numerous to allow joinder, see Rule 23(a)(1), while the defendant insisted that the class contained only 10 members. A judge would not and could not accept the plaintiff's assertion as conclusive; instead the judge would receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class. What is true of disputes under Rule 23(a)(1) is equally true of disputes under Rule 23(b)(3). A court may certify a class under Rule 23(b)(3) only if it finds that all of the prerequisites (such as numerosity) have been demonstrated, and in addition the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. Questions such as these require the exercise of judgment and the application of sound discretion; they differ in kind from legal rulings under Rule 12(b)(6). And if some of the considerations under Rule 23(b)(3), such as "the difficulties likely to be encountered in the management of a class action", overlap the merits – as they do in this case, where it is not possible to evaluate impending

difficulties without making a choice of law, and not possible to make a sound choice of law without deciding whether Bridgeport authorized or ratified the dealers' representations – then the judge must make a preliminary inquiry into the merits.

Courts make similar inquiries routinely under Rule 12(b)(1) and 12(b)(2) before deciding whether they possess jurisdiction over the subject matter of the case and the persons of the defendants, the location of the proper venue, application of forum non conveniens, and other preliminary issues. Often personal jurisdiction is closely linked to the nature, and merit, of the claim being asserted, see, e.g., *Sheet Metal Workers' National Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031 (7th Cir. 2000), but this does not mean that the judge will just take the plaintiff's word about what happened. Nor will the court accept the plaintiff's say-so when deciding how much could be recovered (and thus whether the amount in controversy for diversity jurisdiction is present), even though the maximum recovery depends strongly on the merits. See, e.g., *Pratt Central Park Limited Partnership v. Dames & Moore, Inc.*, 60 F.3d 350 (7th Cir. 1995). When jurisdiction or venue depends on contested facts – even facts closely linked to the merits of the claim – the district judge is free to hold a hearing and resolve the dispute before allowing the case to proceed. A motion under Rule 12(b)(6) is unique in requiring the district judge to accept the plaintiff's allegations; we see no reason to extend that approach to Rule 23, when it does not govern even the other motions authorized by Rule 12(b).

The district judge thought that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 40 L. Ed. 2d 732, 94 S. Ct.

2140 (1974), adopts the approach of Rule 12(b)(6) for decisions under Rule 23. We do not read Eisen so. The Court observed that the 1966 amendment to Rule 23 departed from the earlier handling of class claims by placing certification ahead of a decision on the merits. A class thus can lose as well as win, while in a permissive-intervention system the case is decided on the merits before the identities of the parties to be bound are known. The success of the 1966 amendments (which are still in force) depends on making a definitive class certification decision before deciding the case on the merits, and on judicial willingness to certify classes that have weak claims as well as strong ones. A court may not say something like "let's resolve the merits first and worry about the class later" (Rule 23(c)(1) requires the certification decision to be made "as soon as practicable after the commencement of an action brought as a class action") or "I'm not going to certify a class unless I think that the plaintiffs will prevail." But nothing in the 1966 amendments to Rule 23, or the opinion in Eisen, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers. Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification. We said as much in Eggleston: "Eisen has not been interpreted so broadly . . . as to foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of plaintiff's particular individual claim." 657 F.2d at 895.

The district court's approach, by contrast, is reminiscent of the "across-the-board" rule jettisoned by *General Telephone Co. v. Falcon*, 457 U.S. 147, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). In circuits following the across-the-board rule, district judges were required to assume that all members of a proposed class were situated similarly to plaintiff and to certify classes "across the board." Falcon held, however, that similarity of claims and situations must be demonstrated rather than assumed. The Court pointedly observed that "sometimes it may be necessary for the court to probe beyond the pleadings before coming to rest on the certification question. . . . Actual, not presumed, conformance with Rule 23(a) remains . . . indispensable." 457 U.S. at 160. That is equally true of Rule 23(b). Certifying classes on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys – who may use it in ways injurious to other class members, as well as ways injurious to defendants. Both the absent class members and defendants are entitled to the protection of independent judicial review of the plaintiff's allegations.

Szabo's proposed class is highly problematic, for reasons given in Rhone-Poulenc Rorer and sketched above. Nagging issues of choice of law, commonality, and manageability beset this case. It is unlikely that dealers in different parts of the country said the same things to hundreds of different buyers. (Szabo stresses that Bridgeport accepted each order at its home office, but this does not demonstrate that Bridgeport knew of or ratified any particular representation by any given dealer.) It is unlikely that other models of milling machines exhibit the same problems that Szabo says that the DX-32 unit

has caused in his model. And it is unnecessary to certify a nationwide class. Each buyer has a substantial claim, of the sort that could be, and often is, pursued independently. If any class treatment is appropriate, a class limited to a single state (or customers of a single dealer) would be more practical – though buyers in a single state (or of a single kind of machine) may be too few to justify class treatment. Now that the district court is free to pierce the allegations of the complaint, it may find these and other daunting obstacles good reasons to deny Szabo's request for class certification or certify a more limited class. The order certifying the class accordingly is vacated, and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA,
FORT WAYNE DIVISION

JOHN D. SZABO, d/b/a ZATRON, on behalf of himself and allothers similarly situated, Plaintiff,
v. BRIDGEPORT MACHINES, INC., Defendant.

CIVIL NO. 1:00cv200

199 F.R.D. 280; 2001 U.S. Dist. LEXIS 308

January 12, 2001, Decided
January 12, 2001, Filed

DISPOSITION: Szabo's Motion to Certify Class GRANTED. Bridgeport's Motion to Dismiss Count IV DENIED.

COUNSEL: For ARLIN M ADAMS, mediator: Arlin M Adams, Schnader, Harrison, Segal & Lewis, Philadelphia, PA.

For JOHN D SZABO, plaintiff: Neal Lewis, Neal Lewis and Associates, Orland, IN.

For JOHN D SZABO, plaintiff: Nicholas E Chimicles, James R Malone, Jr, Pamela N Zetterberg, Chimicles and Tikellis LLP, Haverford, PA.

For JOHN D SZABO, plaintiff: Richard P Myers, Paul Reich and Myers, Philadelphia, PA.

For BRIDGEPORT MACHINES INC, defendant: Albert J Dahm, Frederick B Jonassen, Baker and Daniels, Fort Wayne, IN.

For BRIDGEPORT MACHINES INC, defendant: Mark S Baldwin, Brown Rudnick Freed & Gesmer, Hartford, CT.

JUDGES: William C. Lee, Chief Judge, United States District Court.

OPINION BY: William C. Lee

OPINION:

ORDER

This matter is before the court on a motion for class certification filed by the plaintiff, John D. Szabo, d/b/a Zatron ("Szabo"), on August 16, 2000. The defendant, Bridgeport Machines, Inc. ("Bridgeport"), filed its response on September 22, 2000, to which Szabo replied on October 20, 2000. Also before the court is a motion to dismiss Count IV of Szabo's amended complaint, filed by Bridgeport on August 21, 2000. Szabo responded to the motion on September 15, 2000, to which Bridgeport replied on October 10, 2000.

On October 25, 2000, after a preliminary review of the motions, this court requested further briefing from the parties on the issue of choice of law. Szabo filed his supplemental brief on November 13, 2000, Bridgeport filed its response on December 4, 2000, and Szabo filed his reply on January 1, 2001.

For the following reasons, Szabo's motion for class certification will be granted and Bridgeport's motion to dismiss will be denied[1].

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[1] On January 4, 2001, Szabo filed a motion to strike the Supplemental Affidavit of Andrew McNamara. As a result of the rulings set forth below, the court determines that the motion to strike is moot, at least with respect to the currently pending motions.

Factual Background

The pertinent introductory facts of this case are as follows. Szabo, operating as Zatron (a machine shop), provides 3-D design services, CAD/CAM and CNC (computer numerically controlled) programming, the building of precision tool, dies and mold-tooling and production machining. Szabo resides in Indiana. Bridgeport, a Delaware corporation with its principal place of business in Connecticut, is in the business of manufacturing and distributing machine tools. Szabo's complaint arises out of his purchase in July 1997 of a Bridgeport 800/22 vertical machining center with a DX-32 Control Unit from Bridgeport. Szabo alleges that the machine did not perform up to and in accordance with certain technical specifications and performance characteristics allegedly contained in promotional material and an offer letter that Bridgeport's alleged agent, Advance Machinery Company, Inc. ("Advance Machinery"), purportedly gave to Szabo. According to Szabo, the Bridgeport Machine was unable to meet the technical specifications and performance characteristics due to defects inherent in the Bridgeport DX-32 Control Unit. Szabo alleges that Bridgeport had knowledge of these defects and that Bridgeport's brochure and written offer letter contained numerous fraudulent statements and omissions and that Bridgeport acted knowingly or recklessly in making these alleged false and misleading representations and omissions of fact. Szabo asserts claims of negligent misrepresentation, fraud and breach of warranties.

Motion to Certify Class

Szabo seeks certification of a class of all persons[2] who purchased a machining center or a CNC milling machine from Bridgeport that included a Bridgeport DX-32 Control Unit between January 1, 1996 and the present (the "Class Period") and were damaged thereby (the "Class"). Excluded from the proposed class are Bridgeport and its respective officers, directors and employees. Szabo notes that the thrust of this action is that the DX-32 Control Unit incorporated into the machine he bought was inherently defective, which prevented the machine from operating in accordance with its specifications. Therefore, because the Class members all purchased computer numerically controlled machines with the same defective Control Unit, on the basis of standardized performance representations, Szabo argues that this action should be certified as a class action. Certification is sought under Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Under Rule 23 of the Federal Rules of Civil Procedure, this court undertakes a two-step analysis in determining whether class certification is proper. *Hoffman v. Grossinger Motor Corp.*, 1999 U.S. Dist. LEXIS 4172, *4 (N.D. Ill. March 29, 1999). First, the court determines whether the four threshold requirements of subsection (a) of Rule 23 have been met. These requirements are as follows:

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[2] According to Szabo, the class definition is not intended to include persons or entities that do not reside within the United States.

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

Fed.R.Civ.P. 23(a); *see* also *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). These four factors are often referred to as: "numerosity", "commonality", "typicality", and "adequate representation".

Secondly, the court determines whether the action qualifies for class treatment under at least one of the subdivisions of Rule 23(b). *Daniels v. Fed. Reserve Bank of Chicago*, 2000 U.S. Dist. LEXIS 6833, *5 (N.D. Ill. March 28, 2000) (citing *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977)). Szabo is proceeding under Rule 23(b)(3), which provides in relevant part as follows:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b)(3); *Frahm v. Equitable Life Assur. Soc. of United States*, 137 F.3d 955, 957 (7th Cir. 1998). These two

factors are commonly referred to as: "predominance" and "superiority".

Szabo bears the initial burden of advancing reasons why this action meets the requirements of Rule 23. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). In ruling on a motion for class certification the focus is simply on whether the prerequisites of Rule 23 have been met. The court does not conduct a hearing on the merits when deciding upon certification of a class. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974). Additionally, since the class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion. *In re Synthroid Marketing Litig.*, 188 F.R.D. 287, 290 (N.D. Ill. 1999); *Jefferson v. Security Pacific Financial Svcs., Inc.*, 161 F.R.D. 63, 66 (N.D. Ill. 1995). However, "ordinarily the determination should be predicated on more information than the pleadings will provide." *Simer v. Rios*, 661 F.2d 655, 689 (7th Cir. 1981) (quoting *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974)). Rule 23 is to be construed liberally. *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364, 1368 (7th Cir. 1976).

Numerosity

The first requirement of Rule 23 is that "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). This rule does not require that joinder be impossible, but impracticable. *Danis v. USN Commun., Inc.*, 189 F.R.D. 391, 399 (N.D. Ill. 1999); *Joiner v. E&H Plastics Co.*, 1993 U.S. Dist. LEXIS 13840, *9 (N.D. Ill.

Oct. 1, 1993). Courts may make "common sense assumptions" in order to support the finding of numerosity. *Keele v. Wexler*, 1996 U.S. Dist. LEXIS 3253, *8 (N.D. Ill. March 19, 1996), aff'd 149 F.3d 589 (7th Cir. 1997).

Szabo estimates that hundreds of individuals fall within the parameters of the class definition. Szabo claims that members of the Class can be identified by reference to objective criteria such as Bridgeport's sales records which will reveal who purchased CNC milling machines or vertical machining centers that incorporated the DX-32 Control Unit. Szabo indicates that the proposed class consists of all persons, nationwide, who purchased these machines and that, although the exact number of jurisdictions in which the class members reside is not yet known, it would be impracticable to join hundreds of class members from different states. Therefore, Szabo concludes that the numerosity requirement is satisfied.

Bridgeport, however, argues that Szabo has not met the numerosity requirement because he has not sufficiently put forth evidence of the number of the class members. Nevertheless, Bridgeport, which presumably knows the exact number of purchasers who would fit within the proposed class, has not attempted to make any showing that there are not hundreds of potential class members. Additionally, as Szabo points out in detail in his reply brief, Bridgeport's annual report clearly supports an estimate of domestic sales of machining centers in 1998 of over 600 machining centers. In any event, the law is clear that precise enumeration of the members of a class is not necessary for an action to proceed as a class action, and it is permissible to estimate class size. *Daniels*

v. Fed. Reserve Bank of Chicago, 194 F.R.D. 609, 613 (N.D. Ill. 2000); *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 73 (D.N.J. 1993) ("The moving party need not show the exact size of the proposed class to meet this requirement."). Consequently, the court finds that Szabo has met the numerosity requirement.

Commonality, Predominance, Typicality

The next issue is whether there are "questions of law or fact common to the class" and whether the commons questions predominate. Fed.R.Civ.P. 23(a)(2), (b)(3). This is not a demanding requirement. *Anderson v. Cornejo*, 199 F.R.D. 228, 239, 2000 U.S. Dist. LEXIS 3176, *18 (N.D.Ill. 2000); *Warnell v. Ford Motor Co.*, 189 F.R.D. 383, 390 (N.D. Ill. 1999). The rule does not require that all questions be common. *Noon v. Sailor*, 2000 U.S. Dist. LEXIS 7419, *4 (S.D. Ind. March 14, 2000); *see* generally 7A Wright & Miller, Federal Practice & Procedure 2d, § 1763 (1986). In fact, a single common question is sufficient to satisfy the requirements of Rule 23(a)(2), at least in some circumstances. *Rendler v. Corus Bank, N.A.*, 2000 U.S. Dist. LEXIS 5093, *6 (N.D. Ill. March 30, 2000); *Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 399 (N.D. Ill. 1987).

A common question is one which "arises from 'a common nucleus of operative facts' " regardless of whether the underlying facts change over the class period and vary as to individual claimants. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (citations omitted); *see* also *Daley v. Provena Hospitals*, 193 F.R.D. 526, 528 (N.D. Ill. 2000); *Davis v. Cash for Payday, Inc.*, 193 F.R.D. 518, 521 (N.D. Ill. 2000).

Szabo claims that he has alleged a variety of common questions concerning the defects in the DX-32 Control Unit, Bridgeport's dealings with the members of the Class, and the Class members' potential remedies. (Am. Comp. ¶ 81). Szabo further argues that the common questions of law and fact predominate over individual questions, making certification appropriate under Rule 23(b)(3).

Bridgeport, in response, argues that where, as here, the plaintiff moves for certification under Rule 23(b)(3), "Rule 23(a)(2)'s 'commonality' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997). Bridgeport claims that Szabo cannot meet the requirement that the common questions predominate because, according to Bridgeport, multiple individualized issues permeate both Szabo's particular claim and the class claims he alleges. The issue raised by Bridgeport will be discussed below, in connection with typicality. ("The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately represented in their absence." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)).

A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to

the claims of the other class members and his or her claims are based on the same legal theory. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 597; *Rosario v. Livaditis*, 963 F.2d at 1018 (citing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)); *Paper Systems, Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 606 (E.D. Wis. 2000). The typicality requirement is satisfied when all plaintiffs have the same theory of recovery against the defendant based on the same set of facts. *Wollert v. Client Services, Inc.*, 2000 U.S. Dist. LEXIS 6485, *4 (N.D. Ill. March 24, 2000). For class certification purposes, "a named plaintiff need not have suffered precisely the same injury as every member of the class, so long as he has been adversely affected by the same practice or policy, therefore the court must focus on the nature of the class claims and whether they are 'fairly encompassed by the named plaintiff's claims.' " *Koski v. Gainer*, 1993 U.S. Dist. LEXIS 6262, *5 (N.D. Ill. May 6, 1993) (citing *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, 330, 64 L. Ed. 2d 319, 100 S. Ct. 1698 (1980)).

Szabo argues that he is a typical victim of the defendant's practices and that his claims arise out of the same course of conduct and are based on the same legal theories as those of the putative Class members. Szabo notes that the gravamen of his claims is that the DX-32 Control Unit was defective. Szabo alleges that Bridgeport marketed its CNC machines equipped with the control unit as state-of-the-art and capable of certain performance specifications. (Am. Comp. ¶¶ 1, 16-17, 27-29, 34-38, 43). Szabo also claims that Bridgeport was aware that the DX-32 Control Unit had numerous, severe defects. (Am. Comp. ¶¶ 1, 26, 60-72, 97-98, 105). Szabo alleges in his complaint

that the defects in the DX-32 were inherent, and therefore present in every CNC milling machine and vertical machining center that incorporated that unit. (Am. Comp. ¶¶ 26, 60-71, 92). Allegedly, there were problems with acceleration and deceleration which were common to all machines equipped with the DX-32. (Am. Comp. ¶¶ 68, 71). The complaint specifically alleges that many of the problems with the machine have been attributed to problems with the software, which is an inherent defect in the machine. (Am. Comp. ¶¶ 48, 53, 56, 58-59, 69-71). Szabo also alleges that Bridgeport had knowledge of the defects in its products. (Am. Comp. ¶¶ 1, 26, 60-71). The complaint describes numerous complaints by other purchasers of the DX-32 who experienced the same problems as Szabo with their machines. (Am. Comp. ¶¶ 26, 55, 60-71). In light of all the above allegations, Szabo concludes that the common issues in this case are central to his claim and that by litigating the liability issues he can reasonably be expected to advance the interests of all putative Class members in a favorable determination on each common issue. *Weiss v. York Hospital*, 745 F.2d 786, 809-10 n. 36 (3rd Cir. 1984).

Bridgeport, in response, contends that Szabo's claim is inherently dependent upon his unique factual circumstances and, therefore, common factual issues do not predominate. Bridgeport relies on Szabo's deposition, wherein he indicated that numerous oral representations were made to him by Bridgeport's alleged agent (Advanced Machinery), as well as a demonstration of the product. Bridgeport then concludes that Szabo's claim is one based on oral misrepresentations, which oral misrepresentations would be different for each potential Class

member, and, therefore, class certification is not permissible.

Clearly, Bridgeport is forgetting that this court must accept the substantive allegations of Szabo's complaint as true. *In re Synthroid Mktg. Litig.*, 188 F.R.D. 287, 290 (N.D. Ill. 1999). While Bridgeport is free to argue during the merits phase of the case that Szabo cannot base his claim on written materials he received, such an argument has no place in response to a motion to certify class. In any event, the law is clear that the presence of some oral misrepresentations does not preclude class treatment. *Scholes v. Stone, McGuire & Benjamin,* 143 F.R.D. 181, 188 (N.D. Ill. 1992) ("simply because oral misrepresentations exist denial of class certification is not automatic."); *Riordan v. Smith Barney,* 113 F.R.D. 60, 63 (N.D. Ill. 1986) (mere fact that some oral misrepresentations were made does not preclude certification).

Bridgeport also presents the argument that where class members have differing degrees of reliance on promotional materials, class issues do not predominate. *Martin v. Dahlberg,* 156 F.R.D. 207, 215-16 (N.D. Cal. 1994). Szabo, however, strongly contends that the existence of reliance issues does not preclude class certification. Szabo points out that he has alleged that the representations and performance specification in the contracts for sale were uniformly given to all class members. (Am. Comp. ¶¶ 20, 32-38, 43, 47, 81, 86-88, 91, 96-99).

As Szabo points out there is an ample body of federal decisional law holding that reliance may be presumed where common representations are directed at class members. "When the fraud was perpetrated in a uniform

manner against every member of the class, such as when all plaintiffs received virtually identical written materials from the defendants, courts typically hold that individual reliance questions do not predominate." *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 338 (N.D. Ill. 1997).[3] Likewise, in *Peterson v. H&R Block Tax Services, Inc.*, 174 F.R.D. 78 (N.D. Ill. 1997), the court reached a similar conclusion regarding reliance in a class action challenging the defendant's Rapid Refund loan program. The court concluded that the only logical explanation for the class' behavior (paying a fee for the service) was that they relied on the written representations made to them regarding the program. *Id.* at 85. "Courts will presume class members' reliance when it is logical to do so or when the complaint's allegations make reliance apparent." *Id.* at 84-85.

Similarly, in *Spark v. MBNA Corp.*, 178 F.R.D. 431 (D.Del. 1998), the court certified a class action alleging that a bank violated RICO while making misleading statements in card advertisements. The bank argued that the claims of the class could only be supported by a finding that each class member relied on the disputed advertisement, and therefore individual issues predominated over common issues. The court held that courts can "presume reliance 'where it is logical to do so.' " 178 F.R.D. at 435 (quoting *Sharp v. Coopers & Lybrand*, 649 F.2d 175, 188 (3rd Cir. 1981)). Since it was "fair" to presume that the class members opened up accounts because they received

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[3] *See* also *Garner v. Healy*, 184 F.R.D. 598 at 602; *Krause v. GE Capital Mortage Svcs., Inc.*, 1998 U.S. Dist LEXIS 18863, *20 (N.D. Ill. Nov. 20, 1998); *Heastie v. Community Bank*, 125 F.R.D. 669, 676 (N.D. Ill. 1989).

advertisements, it was thus "logical" to presume reliance. 178 F.R.D. at 436.

Szabo reiterates the fact that the four causes of action asserted here are based on the uniform written representations. The available brochures discuss the DX-32 Control Unit in similar terms and Bridgeport used standardized form quotations for the sale of its machines. The Class purchased machines equipped with the Control Unit that, according to the standard form documents, had certain performance characteristics and specifications. Szabo argues that the contracts for purchase of the machines were "common documents," and the Class should be deemed to have relied on the representations (performance specifications and the like) made in the contracts. *Weiss v. Winner's Circle of Chicago, Inc.*, 1992 U.S. Dist. LEXIS 13288, *7 (N.D. Ill. Sept. 3, 1992) (sales contract and accompanying documents established common core of documents, giving alleged scheme a standard set of operative facts by which to demonstrate reliance).[4] Szabo further maintains that it is "logical" to presume that because the Class members contracted for, paid for and received the machines, they relied on the uniform written representations made in connection with the sale. Szabo concludes that Bridgeport's use of uniform and standardized written documents obviates the need to

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[4] Notably, the fact that the potential purchasers were subject to individualized oral solicitations did not alter the conclusion that common questions predominated. 1992 U.S. Dist LEXIS 13288 at *7-8.

demonstrate reliance on an individual basis and, therefore, reliance can be established on a class-wide basis and common issue predominate.

Bridgeport also claims that "agency" issues preclude class treatment. Bridgeport contests the allegation that its distributors were its agents, and contends that this issue creates obstacles to class treatment. Bridgeport claims that its distributors were not agents because its form of distributor agreement contains language indicating that it is not intended to create an agency relationship. Szabo, however, points out that the agency issue is a peripheral one because any sale made by a distributor are "subject to approval and acceptance by Bridgeport at its office located in Bridgeport Connecticut."[5] Bridgeport was to supply the sales literature, and was to retain control over the use of its trade name. Bridgeport also supplied the distributors with standardized agreements for use in the sale of its products. In light of these alleged facts, Szabo claims that even if the distributors were acting outside the scope of their authority in promoting Bridgeport's products with the literature it supplied and selling them pursuant to contractual terms that it provided, Bridgeport ratified the sales to class members. Szabo further claims that, in ratifying the sales, Bridgeport approved contracts that repeated the specifications contained in its sales brochures. Finally, Szabo points out that even though Bridgeport contends that the agency issue will require the consideration of the law of various different states, the contract it invokes contains a choice of law provision, making Connecticut law applicable.

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[5] McNamara Aff. Exh. F at 2.

This court agrees with Szabo that reliance and agency issues do not preclude class certification as they do not defeat the commonality, predominance and typicality requirements. Additionally, with respect to the typicality requirement, it is clear that (contrary to Bridgeport's arguments) the fact that Szabo seeks to represent class members who purchased different models of Bridgeport's machines that incorporated the DX-32 Control Unit does not render him atypical. Typicality is satisfied even where there are factual differences between the claims of the named plaintiff and the claims of class members. *See De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). In *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. at 185-86, 188, the district court rejected an argument that a securities class action could not properly be certified because the class members had invested at different times and in different entities. Similarly, in *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 56-57 (S.D.N.Y. 1993), the district court rejected the contention that class plaintiffs in a case involving limited partnerships could only represent limited partners in partnerships in which they had invested. The *Maywalt* court recognized that the common course of conduct by the defendant made the named plaintiffs typical of investors in all of the affected limited partnerships. *Id.*

Szabo further points out that Bridgeport has exaggerated the differences among the various types of machines that are the subject of this action. According to Szabo, each of the machines performed the same basic function, cutting metal, and each contained the same computer control unit that the plaintiff asserts was inherently defective. The VMC 760 and VMC 800 are the same

basic machine. Likewise the VMC 800 and VMC 1000 are substantially similar, were promoted in the same brochure, and shared a number of common specifications, with the principal difference being the length of the cutting stroke in the X axis. (Am. Comp. ¶¶ 62-72).

In conclusion, the court finds that Szabo has met Rule 23's requirements with respect to commonality, predominance, and typicality.

Adequate Representation

The adequacy of representation requirement of Rule 23(a)(4) consists of two parts: (1) the adequacy of the named plaintiff's counsel and (2) the adequacy of representation provided in protecting the different, separate and distinct interest of the class members. *Retired Chicago Police Ass'n*, 7 F.3d at 598; *Rosario v. Livaditis*, 963 F.2d at 1018. The requirement is met if it appears that the plaintiff's interests are not antagonistic to those of other members of the class he or she seeks to represent, that the representative has a sufficient interest in the outcome to ensure vigorous advocacy, and the plaintiff's attorneys are qualified, experienced and generally able to conduct the litigation. *Davis v. Cash for Payday, Inc.*, 193 F.R.D. 518, 522; *Anderson v. Cornejo*, 199 F.R.D. 228, 240, 2000 U.S. Dist. LEXIS 3176, at *20; *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986).

Bridgeport does not take issue with the qualifications of Szabo's counsel to adequately represent the class. However, Bridgeport claims that Szabo's interests (doing 3D mold work) are incompatible with other Bridgeport machine owners who were not using their machines for

the same type of work as the plaintiff. Clearly, however, as the underlying claim is that the allegedly defective DX-32 Control Unit caused the machines at issue to not meet their specifications, whether Szabo intended to perform the exact type of work with his machine as other potential plaintiffs is totally immaterial.

Bridgeport further argues that there are several issues regarding the plaintiff's credibility and suitability as a class representative with respect to his ability to fulfill his fiduciary duties to the class that have become apparent in light of his deposition testimony. Bridgeport claims that Szabo openly admitted that he downloaded an image of Bridgeport's machine from Bridgeport's website and used it on his own promotional business materials without Bridgeport's permission, in violation of copyright law. In response, Szabo points out that nothing in the record shows that the relevant photograph was copyrighted by appropriate registration or that he acted improperly. Additionally, Szabo furnished Bridgeport's representatives with business cards and brochures that had the photograph on them over two years ago and never received any comments about copyright issues.

Bridgeport also claims that Szabo has made representations to his customers regarding his business' capabilities, using the Bridgeport VMC 800, that are entirely inconsistent with the claims he now asserts against Bridgeport. For example, Szabo claims in a sales letter that he, using his VMC 800 machine, "3D machined numerous gauging, fixturing and mold projects with a high degree of accuracy and excellent surface finishes coming directly off the machine." In response, Szabo

claims that Bridgeport is taking his promotional statements out of context, and further notes that the statements come from a period when Szabo was cooperating with Bridgeport's numerous attempts to make his machine work. As detailed in his responses to interrogatories, those efforts continued over two years, and included the installation of an experimental part to replace the BMDC-3 card that had been one of the standard components when the machine was sold to him.[6]

For a court to deny class certification based on a conflict with the potential class members, there must be real and substantial conflict, not merely a speculative or conjectural one, and it must go to the subject matter of the controversy. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 697-98 (7th Cir. 1986). It is abundantly clear that none of Bridgeport's arguments meet this standard. As Szabo points out, even if his promotional statements were inconsistent with the allegations in this case, this does not create a conflict with the class. *See Rosario*, 963 F.2d at 1018-19 (rejecting contention that typicality and adequacy requirements were not met based upon contention that some class members were "satisfied" with educational services challenged as fraudulent).

Therefore, as Szabo's counsel is qualified to adequately represent the class and Szabo's interests are not antagonistic to those of other class members, the court finds Rule 23's "adequate representation" requirement to have been met.

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[6] *See* Reply Decl., Ex. 23 at 12-19, 41-48.

Superiority

Rule 23(b)(3) requires the consideration of the following factors in determining whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy": (1) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *Taylor v. Halsted Financial Svcs., LLC*, 2000 U.S. Dist. LEXIS 384, *39 (N.D. Ill. Jan. 4, 2000); *Hoffman v. Grossinger Motor Corp.*, 1999 U.S.Dist. LEXIS 4172, *8-9. As Szabo notes, it has been widely recognized that a class action is superior to other available methods for the fair and efficient adjudication of a suit that affects a large number of persons injured by violations of a common law. *See Paper Sys., Inc. v. Mitsubishi*, 193 F.R.D. 601, 616 (class action superior where repeatedly litigating the same issues in individual suits would consume more judicial resources than addressing them in a single blow in consolidated actions).

Szabo argues that Bridgeport has inflicted economic injury on a large number of geographically dispersed persons to such an extent that the cost of pursuing individual litigation to seek recovery against a well-financed adversary is not feasible and, thus, the alternatives to a class action are either no recourse for hundreds of small businesses, or a multiplicity of scattered suits resulting in the inefficient administration of litigation. Szabo further

argues that, given the complex nature of the technology at issue and the need for extensive experts, the cost of pursuing individual claims by Class members could effectively preclude their ability to recover.

Bridgeport, however, argues that there is no need for class certification because the potential class members are business people who have spent over $70,000 for a machine. Bridgeport hypothesizes that any such class member would likely be capable of protecting his own rights. However, this approach was explicitly rejected in *Scholes v. Stone, McGuire & Benjamin, supra.* In *Scholes,* even though the named plaintiff had a claim in excess of $300,000, the district court rejected the same superiority argument proffered here, noting that a class action would provide benefits to investors with claims of less than $50,000 and that judicial economy, efficiency and consistent results would all be promoted by class certification. 143 F.R.D. at 188-89.

Szabo asserts that this is a complex case, and that developing the evidence of defect and presenting it in a way that a jury can comprehend will require significant time and effort. Szabo also informs the court that the possibility of pursuing the case on an individual basis was initially considered by counsel and rejected because of the complex subject matter. Szabo further points out that to the extent that a member of the proposed class has a claim that it wishes to pursue individually, it will remain free to do so by opting out. Fed.R.Civ.P. 23(c)(2). Similarly, class members will be given the option of entering an appearance through counsel should they wish to do so. *Id.* The court finds that Szabo has the better argument on this point and holds that the mere fact that the

machines at issue cost approximately $70,000 does not preclude class certification.

Bridgeport has also claimed that differing state laws militate against a finding of superiority. The court will discuss the issue of choice of law below.

Choice of Law

Two standards must be met in determining choice of law. First, the choice of law analysis must comport with the requirements of due process. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-08, 66 L. Ed. 2d 521, 101 S. Ct. 633 (1981). Second, the choice of law analysis must be consistent with the choice of law principles of the state in which it sits. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941); *Coldwell Banker & Co. v. Karlock*, 686 F.2d 596, 600 (7th Cir. 1982).

The parties agree that Indiana's choice of law rules are to be used to determine what law applies to the proposed class' claims. *See Nucor Corp. v. Aceros y Maquilas De Occidente, S.A. de C.V.*, 28 F.3d 572, 581 (7th Cir. 1994). The application of choice of law principles will vary slightly for the different claims raised in the amended complaint. The warranty claims are – contractual, while the remaining claims (negligent misrepresentation and fraud) are based upon tort theories. The parties agree that Indiana's choice of law rules for torts is addressed in *Hubbard Manufacturing Co., Inc. v. Greeson*, 515 N.E.2d 1071, 1073-74 (Ind. 1987). In *Hubbard*, the Indiana Supreme Court abandoned the principal of lex loci delicti, and adopted an approach that requires an assessment of which jurisdiction has the most significant

relationship with the particular tort. *Id.* This shift was undertaken because the historical focus upon the place where the last act occurred that gave rise to liability often produced anomalous results if the tortious conduct occurred in one state while the harm occurred in another. *Castelli v. Steele*, 700 F. Supp. 449, 452 (N.D. Ind. 1988). Under *Hubbard*, the place where the harm occurred will frequently have the most significant relationship with the dispute, but other factors are to be considered when the place where the harm occurred is an insignificant contact. *Hubbard*, 515 N.E.2d at 1073-74.

Szabo argues that the law of Connecticut is the most appropriate source of substantive law whereas, of course, Indiana law would still govern matters of procedure. With respect to the tort claim of negligent misrepresentation, there are significant differences between Indiana and Connecticut law. The Connecticut Supreme Court has "long recognized liability for negligent misrepresentation. . . . " *Citino v. Redevelopment Agency*, 51 Conn. App. 262, 721 A.2d 1197, 1206 (App. Ct. 1998). Indiana, however, does not recognize negligent misrepresentation, except in limited circumstances focused on the area of employment. *Darst v. Illinois Farmers Ins. Co.*, 716 N.E.2d 579, 584 (Ind. App. 1999).

Returning to a *Hubbard* analysis, the court must determine whether the place of the tort, Indiana, has a significant connection to the action and, if not, which state has the most significant relationship to this case. As recognized in *Hubbard*, the place where the harm occurred will frequently have the most significant relationship with the dispute, but other factors are to be considered when the place where the harm occurred is an

insignificant contact. 515 N.E.2d at 1073-74. *Hubbard* endorsed factors set forth in the Second Restatement, which provides in relevant part as follows:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.[7]
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties are centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

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[7] Section 6 of the Restatement directs courts to consider a variety of factors, including (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 245. *See Hubbard Manufacturing v. Greeson*, 515 N.E.2d at 1073-74.

Indiana's contacts are that the injury occurred in Indiana, Szabo's residence is in Indiana, and the lawsuit was filed in Indiana. Szabo argues that Connecticut's contacts are directly related to the wrongful acts alleged and are therefore more significant:

1. The machine Szabo bought was assembled and the defective control unit was incorporated into it in Connecticut.

2. The decision to sell inherently defective machines was made in Connecticut.

3. The brochure Szabo reviewed that incorporated the specifications and other misleading statements about the machine he purchased came from Connecticut.

4. The form contract that documented Szabo's purchase and incorporated the misleading specifications for the machine was prepared in Connecticut, where Bridgeport apparently maintained a computer bulletin board with form contracts for use of its dealers.

5. The decision to use these misleading documents in connection with the sale of the machinery was made in Connecticut.

6. The proposed sale of the machine arranged by the local dealer was approved by Bridgeport in Connecticut, which is when Szabo's relationship with the defendant was formally established.

7. Since the contract was "F.O.B. Bridgeport, Connecticut," title to the machine passed to Szabo in Connecticut.

Bridgeport, however, disagrees with Szabo that Indiana's contacts are insignificant. Bridgeport goes so far as to argue that if the state in which the last event giving rise to liability also has other contacts with the suit, and the suit was filed in that state, that state's law should apply. Bridgeport cites to *Paper Mfrs. Co. v. Rescuers, Inc.*, 60 F. Supp. 2d 869 (N.D. Ind. 1999), in support of its assertion. In *Paper Mfrs.*, Judge Sharp of this Court stated:

> A modified version of the "significant relationship test" was adopted by the Indiana Supreme Court in *Hubbard*, in the context of determining whether to apply Indiana or Illinois product liability law. *Hubbard Mfg.*, 515 N.E.2d 1071, 1073. Indiana's choice of law rules dictate that when an action arises in tort the trial court must first ask where the last event necessary to give rise to liability occurred. *American Family*, 839 F. Supp. 579. This is the traditional lex loci delicti commissi rule. *Big Rivers Elec. Corp. v. General Elec. Co.*, 820 F. Supp. 1123 (S.D. Ind. 1993). Secondly, the court must ask whether the place of the last event bears any connection to the legal action, and if the place of the last event has sufficient connection to the legal action, that state's law applies and the inquiry is concluded. *American Family*, 839 F. Supp. at 582; *Cox by Zick v. Nichols*, 690 N.E.2d 750 (Ind.Ct.App. 1998), reh'g denied. *See Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799 (7th Cir. 1997); *Giffin v. Summerlin*, 78 F.3d 1227, 1230 n. 3 (7th Cir. 1996). However, if the place of the last event does not have sufficient connection, the court moves to the third step and considers the place where the conduct causing the injury occurred, the residence or place of business of the parties, and the place where the relationship is centered. *Big Rivers*,

820 F. Supp. at 1125; *Jean v. Dugan*, 814 F. Supp. 1401 (N.D. Ind. 1993), aff'd 20 F.3d 255 (7th Cir. 1994).

60 F. Supp. 2d at 875.

Clearly, *Paper Mfrs.* cannot be read as broadly as Bridgeport would like. It is not enough that Indiana has some connection with the action, it must have sufficient connection. As the Indiana Appellate Court stated in *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283 (Ind. App. 1998):

> Peat Marwick insists that the trial court erred when it found that "nearly 600 farmers conducting business at Indiana grain elevators in alleged reliance upon the existence of a USDA license posted on the wall constituted insignificant contacts with Indiana." Appellant's Brief at 12. This argument improperly focuses on a quantitative view of state contacts which in a class action would dictate a result based upon the number of plaintiffs. Here, the farmers alleged accounting negligence on the part of Peat Marwick. Specifically, they claim Peat Marwick failed to adequately audit MGI's financial statements. Designated evidence indicated the audit was prepared by Peat Marwick in Missouri, for a client whose principal place of business was Missouri, which office then relicensed MGI. The presence of these facts in an action for accountant negligence render insignificant, in a choice-of-law analysis, the Indiana nature of the farmers' contacts.

689 N.E.2d at 1287.

The court notes that Asher, as an Indiana intermediate appellate court decision, is to be granted substantial

weight. "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise," *West v. American Tel. & Te. Co.*, 311 U.S. 223 at 237, 85 L. Ed. 139, 61 S. Ct. 179 (citations omitted); *See* also *Malone v. Bankhead Enterprises, Inc.*, 125 F.3d 535, 539 (7th Cir. 1997) (describing decisions of intermediate state appeals courts as "perhaps the best indication" of how state supreme court would rule); *Echo Inc. v. Whitson Co. Inc.*, 121 F.3d 1099, 1102 n.1 (7th Cir. 1997) (federal courts may not disregard decision of intermediate state appellate court absent persuasive basis to conclude state supreme court would rule differently).[8] Additionally, to the extent that *Paper Mfrs.* is in conflict with *Asher*, it is a false conflict. After noting that Pennsylvania law arguably would apply, the court noted that "the plaintiff concedes . . . that the laws of Pennsylvania and Indiana are similar and produce similar results." 60 F. Supp. 2d at 875 n.4. Significantly, there was no argument that the law of the defendant's domicile should be applied. *Id.* at 873 n.3.

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[8] The Supreme Court of Indiana denied a request for transfer in *Asher, KPMG Peat Marwick v. Asher*, 706 N.E.2d 166 (Ind. 1998). While this disposition does not necessarily reflect the Supreme Court's agreement with the reasoning or the result of *Asher*, Indiana case law suggests that this court "ma [sic] ascribe some meaning to the denial of transfer." *Roberts v. State*, 725 N.E.2d 441, 446 (Ind. App. 2000), transfer denied, 735 N.E.2d 234 (Ind. 2000).

While it is true that Szabo is an Indiana resident and the machine he purchased is located in Indiana, the court finds these to be insignificant contacts with respect to the current action. Szabo's allegations against Bridgeport concentrate on Bridgeport's action and representations made in Connecticut. Therefore, Indiana's contacts are of inconsequential significance.

Bridgeport also argues that Connecticut's contacts are insignificant, and claims that "in his desperate attempt to focus this Court's inquiry on the State of Connecticut, plaintiff has made a number of erroneous factual statements or assumptions." Bridgeport's Memorandum of Law Regarding Choice of Law, at 10. For example, Bridgeport disputes that Szabo had a relationship with Bridgeport, and argues that all of Szabo's discussions regarding his purchase of the machine took place in Indiana and that his purchase contract was also prepared in Indiana.

In response, Szabo reiterates the principle that, in ruling on a class certification, the question is "whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23. . . . " *Eggleston v. Chicago Journeymen Plumbers' Local No. 130*, 657 F.2d 890, 895 (7th Cir. 1981) (emphasis added). Szabo argues that Bridgeport is not permitted, at this stage, to contest the validity of his theory that the local dealer with whom he dealt was Bridgeport's agent. Szabo has also supplemented the allegations of his complaint with documents produced in discovery that show that Bridgeport maintained standardized form contracts on a computerized bulletin board for the use of its dealers, and that the terms of those standardized contracts match the terms of

the contract for sale that Szabo received. Szabo has also relied upon Bridgeport's agreement with its local dealer to support his contention that the contract which he signed for the purchase was approved by the defendant in Bridgeport, Connecticut.

Szabo further relies upon these materials to demonstrate that Bridgeport drafted the terms of the contract that documented Szabo's purchase of his machinery center. Szabo points out that this document, along with the brochure he received, form the basis of his claims for fraud, negligent misrepresentation and breach of warranty. Additionally, with respect to oral statements made to Szabo by representatives of Advance Machinery, Szabo notes that nothing in the record indicates that the oral statements made to him did anything more than reinforce the statements made in the promotional brochure concerning the specifications for the machine, and similar statements in the quotation that ultimately served as the documentation for Szabo's purchase.

This court agrees with Szabo that Bridgeport has inappropriately attempted to litigate the merits of Szabo's claims. As Szabo has shown that Indiana does not have significant contacts with the cause of action, and Connecticut does have significant contacts, the law of Connecticut will be applied to Szabo's negligent misrepresentation and fraud claims.

With respect to the warranty claims, this court agrees with Szabo that under Indiana choice of law principles for contract actions, Connecticut law should apply to both the express and implied warranty claims. Indiana's choice of law rule for contract actions directs that the

court should apply the substantive law of the state with "the most intimate contact to the facts." *Travelers Indem. Co. v. Summit Corporation of America*, 715 N.E.2d 926, 931 (Ind. App. 1999). Clearly, Connecticut is the state with the "most intimate contacts" to the warranty claims.

Szabo claims that he was injured because the DX-32 Control Unit incorporated into his machining center is defective. The shipment of the defective machining center is the conduct that caused Bridgeport to breach its express and implied warranties. The brochures and sales contract containing the specifications that form the basis of the express warranty claim came from Connecticut. Bridgeport is based in Connecticut, which is where the machine was shipped from and where the decision to sell under the faulty specifications was made. Finally, the contract that Szabo signed was F.O.B. Bridgeport Connecticut, which means that title to the machine and risk of loss passed to him at that location, not in Indiana.

In sum, the court finds that Connecticut law applies to the claims in this cause of action. As the substantive law of a single state is applicable to all of the claims with respect to Szabo and all putative class members, Bridgeport's argument that the case is unmanageable as a class action fails. The court finds that Szabo has shown that all of Rule 23's requirements have been met. Accordingly, the court will grant Szabo's motion to certify a class.

Motion to Dismiss

Bridgeport has filed its motion to dismiss pursuant to Rule 12(b)(6) asserting that, with respect to Count IV (a

claim of fraud), Szabo has failed to state a claim for which relief can be granted. More specifically, Bridgeport asserts that Szabo has failed to state the elements of a prima facie case of fraudulent misrepresentation because he has failed to allege any nexus between the alleged misrepresentations Bridgeport made to him and Bridgeport's alleged knowledge of performance problems with other machines.

In deciding a Rule 12(b)(6) motion to dismiss, this court "accept[s] as true all well-plead [sic] factual allegations in the complaint and draw[s] all reasonable inferences therefrom in favor of the [non-moving party] plaintiff." *Perkins v. Silverstein*, 939 F.2d 463, 465 (7th Cir. 1991); *see* also *Lincoln Nat'l Life Ins. Co. v. Donaldson, Lufkin & Jenrette*, 9 F. Supp. 2d 994 (N.D. Ind. 1998). The court may, without transforming a motion under Rule 12(b)(6) into a Rule 56 motion, consider documents not attached to the Complaint which are nevertheless central to the plaintiff's Complaint and referred to in the Complaint. *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994).

On July 10, 2000, this court granted Bridgeport's motion to dismiss Count IV of Szabo's complaint. On July 24, 2000, Szabo filed an amended complaint. With these amendments, Szabo sought to address this court's holding that (1) Szabo did not allege that Bridgeport had knowledge that specific representations it made to Szabo regarding the equipment he purchased were false, and (2) that Szabo did not sufficiently allege omissions by Bridgeport constituting actionable fraud. Bridgeport, in its present motion, argues that Szabo has still failed to allege the prima facie elements of fraud.

In support of its motion to dismiss, Bridgeport first contends that Szabo has not properly alleged that Bridgeport had knowledge that the specific representations it made to Szabo with respect to the specific equipment Szabo purchased were false. Szabo, however, argues that he has specifically alleged that Bridgeport had knowledge of the defects in the DX-32 Control Unit (which was installed on various Bridgeport machines) long before Szabo purchased his machine. For example, the Amended Complaint states:

> 60. At the time when Zatron purchased the VMC 800 with the DX-32 Control Unit, the Company [Bridgeport] was well aware of the defective condition of the DX-32 Control Unit. Well in advance of the time when plaintiff purchased his VMC-800, Bridgeport had received a number of communications from customers and from distributors which reported impaired performance for the VMC 760, when fitted with the DX-32 Control Unit, indicating that the control unit was inherently defective. The VMC 760, when fitted with the DX-32 Control Unit, suffered from problems handling acceleration and deceleration, causing the machine to bump and shudder and creating dwell marks where the tool head rested in one place for too long.
>
> 61. These communications were more than sufficient to put Bridgeport on notice of the inherent defects in the DX-32 Control Unit, particularly since the VMC 760 shared many of the same performance specifications for stroke, rapid traverse rate, maximum feed rate, spindle speed, positioning accuracy, machine accuracy and repeatability as the VMC 800 and VMC 1000 machines.

* * *

> 66. In addition to these communications outlined above, Bridgeport received written reports of all service calls made by its distributors, and the reports contained product defect codes designed to permit the Company to track problems experienced with its machines in the field. This is demonstrated by the fact that Bridgeport has produced with its initial disclosures copies of reports of the service calls made at Zatron's premises to service plaintiff's VMC 800.

In response to these allegations, Bridgeport reiterates its argument that Szabo's allegations regarding problems with the VMC 760 that preceded plaintiff's purchase are irrelevant because Szabo purchased the VMC 800 and not the VMC 760.

As Szabo points out, however, he has alleged that the VMC 760, VMC 800, and VMC 1000 all incorporate the same defective DX-32 Control Unit and that it is defects in the Control Unit that triggered this action, not the type of machine that was purchased. Szabo also claims that recent discovery has bolstered his claims and, if necessary, the complaint could be amended to add these allegations. Szabo points out that a Bridgeport Service Bulletin from November 1997 indicates that the DX-32 software installed on the VMC and Torq-Cut machining centers is the same. Szabo further claims that Bridgeport's argument is substantially undercut by its own documents, which show that the VMC 800 that the plaintiff bought is

the same model as the VMC 760.[9] In reply, Bridgeport states that even if the VMC 760 was "substantially similar" to the VMC 800 and Bridgeport was aware of problems with the VMC 760 (and the DX-32 Control Unit), such allegations still fail to support a claim of fraud. Notably, Bridgeport has not cited any cases in support of this statement.

While factual issues may still exist as to whether the VMC 760 and the VMC 800 are the same machine or even substantially similar machines, this court finds that dismissal for failure to state a claim is not appropriate. Szabo has alleged that Bridgeport had knowledge that its representations as to the performance of its machines utilizing the DX-32 Control Unit were false, and that the machines with known problems were essentially the same as the machine Szabo ultimately purchased. These allegations sufficiently permit Szabo to defeat a motion to dismiss.

Bridgeport also asserts that Szabo failed to make any claims that Bridgeport made material representations regarding acceleration and deceleration or dwell marks. Szabo, however, argues that Bridgeport stated that machinery equipped with the DX-32 Control Unit could perform at certain specified speeds, and further stated that the Control Unit was capable of processing 500 program blocks per second. Thus, according to Szabo,

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[9] Exhibit 2 at B000085 states "The specifications of the new VMC 800 have not changed from the familiar VMC 760 machine. . . . the nomenclature has been updated to reflect the 31.5 inches of 'x' travel which converts to 800mm."

Bridgeport has essentially made material misrepresentations regarding the acceleration and deceleration capabilities of the Control Unit. Szabo also points out that he has challenged the representation that the Control Unit was "proven", and acceleration and deceleration are central to the function of a CNC control unit. Szabo argues that, at the least, in light of the representations that Bridgeport made about the performance of its product and its "proven" Control Unit, Bridgeport was under a duty to reveal the problems that the DX-32 Control Unit had with acceleration and deceleration calculations.

Under Connecticut law, it is "fundamental" that a person who speaks has a duty to disclose enough to prevent his words from being misleading. *Baskin v. Hawley*, 807 F.2d 1120, 1132 (2d Cir. 1986). "A statement disclosing favorable information but omitting all references to material unfavorable facts breaches that duty." *Id. See* also Restatement (Second) of Torts § 529 & Comments a, b (1977); Prosser & Keeton, Law of Torts § 106 at 738 (5th ed. 1984). An innocent misrepresentation may be actionable if the declarant has the duty of knowing the truth. *Omega Engineering, Inc. v. Eastman Kodak Co.*, 908 F. Supp. 1084, 1095 (D.Conn. 1995). This court agrees with Szabo that the allegations in the amended complaint demonstrate that Bridgeport was aware of the problems (which affected acceleration and deceleration) with the DX-32 Control Unit before Szabo purchased the VMC 800, and that there is a nexus between the acceleration and deceleration problems and the representations Bridgeport made about the performance of machines equipped with the Control Unit.

Bridgeport next argues that Szabo has failed to sufficiently allege reasonable reliance. The amended complaint states:

> 106. Plaintiff Zatron and the members of the Class reasonably relied to their detriment on the aforementioned representations and omissions of fact by Bridgeport and were fraudulently induced to purchase their CNC milling machines and machining centers based upon the aforementioned representations and omissions of fact by Bridgeport.

"Reasonable reliance is primarily a fact question as to (1) what the plaintiffs believed, and (2) the circumstances surrounding the misrepresentation made by the [defendant]." *Foy v. Pratt & Whitney Group*, 127 F.3d 229, 235 (2nd Cir. 1997). Bridgeport has raised questions of fact with respect to whether Szabo reasonably relied upon its representations. Bridgeport claims that Szabo was a "savvy businessman" and that he had carefully researched the VMC 800 prior to purchase. While it may be that Szabo will not ultimately be able to prove reasonable reliance, there can be no real dispute that he has sufficiently alleged this element of his fraud claim. *See* Amended Complaint at ¶ 106, *supra*.

Accordingly, as Szabo has alleged with sufficient particularity the requisite elements of a fraud claim, Bridgeport's motion to dismiss will be denied.

Conclusion

On the basis of the foregoing, Szabo's Motion to Certify Class is hereby GRANTED. Further, Bridgeport's Motion to Dismiss Count IV is hereby DENIED.

Enter: January 12, 2001.

William C. Lee, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

JOHN D. SZABO, d/b/a ZATRON, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	CIVIL NO.
v.	)	1:00cv200
BRIDGEPORT MACHINES, INC.,	)	
Defendant.	)	

ORDER

(Filed Mar. 1, 2001)

This matter is before the court on a motion to reconsider filed by the defendant, Bridgeport Machines, Inc. ("Bridgeport"), on January 29, 2001. The plaintiff, John D. Szabo, d/b/a Zatron ("Szabo"), filed his response to the motion on February 7, 2001, to which Bridgeport replied on February 20, 2001. Also before the court is a motion to strike the Second Supplemental Affidavit of Andrew McNamara, filed by Szabo on February 9, 2001. Bridgeport filed its objection to the motion to strike on February 23, 2001, to which Szabo replied on February 28, 2001.

For the following reasons, the motion to reconsider will be denied and the motion to strike will be deemed moot.

Discussion

On January 12, 2001, after extensive briefing by the parties, this court granted Szabo's motion for class certification. Bridgeport, without any discussion of the standard by which motions to reconsider are governed, has requested that the court reconsider its order of January 12, 2001.

"Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996) (citing *In Re Oil Spill*, 794 F. Supp. 261, 267 (N.D. Ill. 1992)). The Seventh Circuit Court of Appeals has, in no uncertain terms, described a motion to reconsider frivolous if it contains no new evidence or arguments of law explaining why the judge should change the original order. *See Magnus Electronics, Inc. v. Masco Corp. of Indiana*, 871 F.2d 626, 629 (7th Cir. 1989); *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986). "Motions for reconsideration generally serve a very narrow function and must be supported by a showing of extraordinary circumstances justifying relief from judgment." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1988); *Bally Export Corp. v. Balicar Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986). The rulings of a district court are not to be viewed "as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988); *Amp-Rite Electric Company, Inc. v. International Brotherhood of Electrical Workers*, 2000 WL 1368038 (N.D. Ill. Sept. 14,

2000). Additionally, the Seventh Circuit has repeatedly stated that "motions for reconsideration are designed to correct manifest errors of law or fact or to present newly discovered evidence." *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987); *see also Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985).

The court will first discuss Bridgeport's contention that this court should have conducted an evidentiary hearing on the motion for class certification. This contention comes as quite a surprise considering that Bridgeport failed to request such a hearing in the nearly six month period during which Szabo's motion was pending. The Local Rules of this court clearly state:

> A request for an evidentiary hearing on a motion or petition may be made by any party after a motion or petition has been filed. The request for hearing shall set forth specifically the purpose of the hearing and an estimate of the time reasonably required for the court to devote to the hearing.

N.D. Ind. R. 7.5 Compliance with the local rules of this court is not optional. *Grassi v. Information Resources, Inc.*, 63 F.3d 596, 602 (N.D. Ind. 1995). Additionally, Bridgeport fails to take into account this court's broad discretion in addressing class certification issues under Rule 23 of the Federal Rules of Civil Procedure (which Rule does *not* include any provision for an evidentiary hearing). The Seventh Circuit has routinely held that it is within the district court's discretion to hold a hearing or not, depending on the district court's evaluation of the motion

to certify. "In certain circumstances, an evidentiary hearing may be necessary for full evaluation of the class issue. But we do not believe that an absolute rule is necessary to insure full explication of the class issue. . . . " *Simer v. Rios*, 661 F.2d 655, 671 (7th Cir. 1981). As will be discussed more fully below, this court found that a full evaluation of the class issue was attainable solely on the basis of the evidentiary record before the court.

The basic thrust of Bridgeport's motion to reconsider is its insistence that the proposed class does not meet Rule 23's requirements and that in finding that the proposed class does meet Rule 23's requirements this court improperly accepted Szabo's complaint as true. While the court will not engage in a blow-by-blow rehash of Bridgeport's prior arguments, the court will address a few of the points raised by Bridgeport for the sole purpose of easing the confusion which apparently exists in the mind of Bridgeport's counsel.

Szabo, who purchased a machining center from Bridgeport, seeks to represent the class of all persons who purchased a machining center or a CNC milling machine from Bridgeport that included a Bridgeport DX-32 Control Unit between January 1, 1996 and the present and were damaged thereby. Szabo's premise is that because the Class members all purchased computer numerically controlled machines with the same defective Control Unit, on the basis of standardized performance representations, a class action is appropriate. Quoting from this court's order of January 12, 2001, the standard of analysis for Rule 23 motions is as follows:

Under Rule 23 of the Federal Rules of Civil Procedure, this court undertakes a two-step analysis in determining whether class certification is proper. *Hoffman v. Grossinger Motor Corp.*, 1999 U.S. Dist. LEXIS 4172, *4 (N.D. Ill. March 29, 1999). First, the court determines whether the four threshold requirements of subsection (a) of Rule 23 have been met. These requirements are as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

Fed.R.Civ.P. 23(a); *see also Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). These four factors are often referred to as: "numerosity", "commonality", "typicality", and "adequate representation".

Secondly, the court determines whether the action qualifies for class treatment under at least one of the subdivisions of Rule 23(b). *Daniels v. Fed. Reserve Bank of Chicago*, 2000 U.S. Dist. LEXIS 6833, *5 (N.D. Ill. March 28, 2000) (citing *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977)). Szabo is proceeding under Rule 23(b)(3), which provides in relevant part as follows:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b)(3); *Frahm v. Equitable Life Assur. Soc. of United States*, 137 F.3d 955, 957 (7th Cir. 1998). These two factors are commonly referred to as: "predominance" and "superiority".

Szabo bears the initial burden of advancing reasons why this action meets the requirements of Rule 23. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). In ruling on a motion for class certification the focus is simply on whether the prerequisites of Rule 23 have been met. The court does not conduct a hearing on the merits when deciding upon certification of a class. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). Additionally, since the class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion. *In re Synthroid Marketing Litig.*, 188 F.R.D. 287, 290 (N.D. Ill. 1999); *Jefferson v. Security Pacific Financial Svcs., Inc.*, 161 F.R.D. 63, 66 (N.D. Ill. 1995). However, "ordinarily the determination should be predicated

> on more information than the pleadings will provide." *Simer v. Rios*, 661 F.2d 655, 689 (7th Cir. 1981) (quoting *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974)). Rule 23 is to be construed liberally. *Anschul v. Silmar Cruises, Inc.*, 544 F.2d 1364, 1368 (7th Cir. 1976).

Bridgeport takes issue with this court's reliance on established law which states that, at this stage of the litigation, the substantive allegations in the complaint are accepted as true. Bridgeport does not dispute that this proposition is the law in this circuit[1], but argues that the law is wrong because it misreads the underlying Supreme Court cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). The pertinent discussion in *Eisen* is as follows:

> We also agree with the Court of Appeals that petitioner must bear the cost of notice to the members of his class. The District Court reached the contrary conclusion and imposed 90% of the notice cost on respondents. This decision was predicated on the court's finding, made after a preliminary hearing on the merits of the case, that petitioner was 'more than likely' to prevail on his claims. Apparently, that court interpreted Rule 23 to authorize such a hearing

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[1] *See also* 5 James Wm. Moore *et al.*, *Moore's Federal Practice* § 23.46[4] (3d ed. 1999) ("On a motion for class certification a court may not decide the merits of the case, but must accept the substantive allegations contained in the complaint as true.") (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598-99 (7th Cir. 1993); *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 55 (N.D. Ill. 1996)).

as part of the determination whether a suit may be maintained as a class action. We disagree.

We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action. . . .' In short, we agree with Judge Wisdom's conclusion in *Miller v. Mackey International*, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:

> 'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' *Id.*, at 427

Additionally, we might note that a preliminary determination of the merits may

> result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

417 U.S. at 177-78

In *General Tel.*, the Supreme Court stated:

> We do not, of course, judge the propriety of a class certification by hindsight. The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). As we noted in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Id.*, at 469, 98 S.Ct., at 2458 (quoting *mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558, 83 S.Ct. 520, 522, 9 L.Ed.2d 523). Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. Even after a certification order is entered, the judge remains free to modify it in the

> light of subsequent developments in the litigation. For such an order, particularly during the period before any notice is sent to members of the class, "in inherently tentative." 437 U.S., at 469, n. 11, 98 S.Ct., at 2458 n. 11. This flexibility enhances the usefulness of the class-action device; actual, not presumed, conformance with Rule 23(a) remains, however, indispensable.

457 U.S. at 160.

From these two cases Bridgeport has constructed a standard of analysis it doggedly insists this court is required to apply. According to Bridgeport, since it has contested the facts underlying Szabo's assertion that class certification is appropriate, the court cannot accept the facts as alleged in Szabo's complaint but must conduct an inquiry to determine whether Bridgeport's facts, rather than Szabo's facts, are true.

Clearly, Bridgeport's interpretation of Supreme Court law is a bit myopic. It is clear (as this court acknowledged in its order of January 12, 2001), that it is sometimes appropriate for a court to "probe behind the pleadings" when making a decision on certification. However, this is not to say that such a probing is required in every case in which Rule 23 certification is contested (which would be virtually every Rule 23 motion), or that such probing involves deciding contested issues of fact that go to the heart of the plaintiffs' claims[2]. In the present case,

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[2] The court fully realizes, however, that it is not barred from examining the issues involved in the litigation in order to determine whether to certify a class. *See Elliot v. ITT Corp.*, 150

Szabo's extensive complaint contains excruciating detail, including specific quotations from internal communications among defendant's employees discussing the problems experienced with machines equipped with the DX-32 Control Unit. Additionally, the court had before it Szabo's deposition transcript, his interrogatory responses (which exceeded 60 pages in length), and a variety of Bridgeport's own documents. Therefore, unlike some cases where the issues are not plain from the pleadings, *see General Tel., supra,* the issues in the present case were fully presented to the court, along with a virtual plethora of facts.

Moreover, in many instances where Bridgeport claims that the court must accept its version of the facts as true, the facts were not relevant to the issue. For example, in connection with this court's discussion of whether common factual issues predominate, this court noted that Bridgeport's position was that Szabo's claim is one based on oral misrepresentations, which oral misrepresentations would be different for each potential Class member, arguably rendering class certification inappropriate. Order at 9. This court then went on to note that "[i]n any event, the law is clear that the presence of some oral misrepresentations does not preclude class treatment. Order at 10, citing to *Scholes v. Stone, McGuire & Benjamin,* 143 F.R.D. 181, 188 (N.D. Ill. 1992). Therefore,

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F.R.D. 569, 572 (N.D. Ill. 1992) (although court cannot consider arguments on merits, court should consider substantive elements of plaintiff's claims and proof necessary to those elements so as to envision form trial would take). In the present case, the issues were fully examined in the parties' numerous briefs and this court's thirty-one page order.

even if Bridgeport's facts had been accepted as true (that the claim was based on oral misrepresentations), under the applicable law class representation was not precluded.

The remainder of Bridgeport's arguments, including the arguments with respect to choice of law, are clearly rehash. This court carefully considered Bridgeport's arguments during its initial consideration of the motion for class certification[3]. Bridgeport has not cited to any new evidence or new law in this matter. Therefore, the court declines Bridgeport's offer to reconsider the order of January 12, 2001.

In light of the fact that this court has not changed its order of January 12, 2001, Szabo's motion to strike the affidavit of Mr. McNamara will be deemed moot.

Conclusion

On the basis of the foregoing, Bridgeport's motion to reconsider is hereby DENIED. Further, Szabo's motion to strike is hereby DEEMED MOOT.

Enter: March 1, 2001.

/s/ William C. Lee
William C. Lee, Chief Judge
United States District Court

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[3] In fact, the court considered numerous briefs related to issues raised by the motion for class certification.

28 U.S.C. § 1292

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an

appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)

(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United

States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)

(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal

from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not

otherwise provided for under subsection (a), (b), (c), or (d).

Fed. R. Civ. P. 23

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified

through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in

such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

EXHIBITS TO DECLARATION OF JAMES R. MALONE, JR., IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS ACTION CERTIFICATION

EXHIBIT 4

Kreithen, Marvin
From: Kreithen, Marvin
Sent: Wednesday, July 15, 1998 9:35 AM
To: Fallows, Steve; Stater, Bart
Subject: FW: Torq-Cuts with DX-32

– Original Message –
From: Griffith, Dan
Sent: Tuesday, July 14, 1998 4:17 PM
To: Kreithen, Marvin
Subject: FW: Torq-Cuts with DX-32

. . . .
From: Dick_Rivett@mchysales.com[SMTP: Dick Rivett@mchysales.com]
Sent: Tuesday, July 14, 1998 4:21 PM
To: dang@bpt.com
Cc: rrochford@bpt.com : ghooper@bpt.com : jimb@bpt.com
Subject: Torq-Cuts with DX-32

Dear Dan:

We feel we have two very serious situations that require immediate attention and we are detailing them as noted below.

1. We have several customers – Vantron, Industrial Light and Magic, Cherry Textron and Complete Machine – who have complained of a serious bumping and jolting when doing short moves during contouring. Additionally, our very good customer, Metalcraft, has complained of poor surface finish on their new TC-3.

To try to understand this problem, we simulated contouring in our showroom machines both in Northern California and Southern California (these are brand new TC-2?s

[sic] and TC-3?s [sic] with the DX-32 Control) and find that we have an extreme bumping and thumping problem that is completely unacceptable. We tried the same program on the TC-3G machine with Fanuc control and found that it did not exhibit this condition.

We feel this problem is such that it will significantly reduce our ability to sell machines with the DX-32 control.

Our John Gale has had conversations with two engineers at Bridgeport, Bart Stater and Marv Kreithen, and the suggestion was made to put an older software level into the machine. Obviously we cannot do this and need a real fix from Bridgeport to solve this problem once and for all. Please review this situation and let us have a response from you as soon as possible.

2. As you may or may not know, Machinery Sales Co. purchased six ?Controls in a Box? (CIB?s) [sic] to support our sales and we have had to use several of them, including Metalcraft and Martin Enterprises. Additionally, we found that one of our own spares that we installed was defective. We hear from Jim Brewer that there is a software fix of some type for this. However, if this is true, we need to have the software and complete written instructions on how and where to use it as quickly as possible.

Dan, we don?t [sic] like to bother you with these problems, but we feel that we are seriously compromising our ability to sell Bridgeport products with the DX-32 control and know that if we are having these problems, it is probably nationwide.

We look forward to hearing from you as quickly as possible.

Very truly yours,

Richard C. Rivett
Chairman

cc: Bob Rochford, Graham Hooper, Jim Brewer

EXHIBIT 5

Stater, Bart
From: Kreithen, Marvin
Sent: Monday, August 03, 1998 4:00 PM
To: Griffith, Dan; Ross, Robert; Hooper, Graham; Fallows, Steve; Nagasuru, Dayal; Stater, Bart
Subject: RE: V5/V6 concerns

– Original Message –
From: Griffith, Dan
Sent: Monday, August 03, 1998 2:22 PM
To: Kreithen, Marvin
Subject: FW: V5/V6 concerns

. . . .
From: Kreithen, Marvin
Sent: Monday, August 03, 1998 10:13 AM
To: Griffith, Dan; Ross, Robert; Hooper, Graham; Fallows, Steve; Nagasuru, Dayal; Stater, Bart
Subject: RE: V5/V6 concerns

[Kreithen, Marvin] What I wrote was based on my assessment of the situation as it was told to me by Steve and Dayal this morning. If Rich is working on V5 as a base to test concepts it sure wasn't communicated to Steve or Dayal who had real concerns about this approach particularly since what Steve is doing is based on V6. Steve isn't just working on the parser – he is working on the whole approach Bryan took to accel-decel. This is what we found today:

1. In a program with polylines, the accel decel logic ignores all but the first given feedrate (if subsequent

blocks have reduced feedrate values they are ignored). Evidently the accel-decel logic calculates a maximum clamping value for a polyline segment and goes with it without checking if the programmed feedrate has been reduced. This is important because one possible solution is pre-modifying the feedrate in each move segment as you go along.

2. For a circle moving at a programmed feedrate, there is a maximum feedrate that can be used for a given diameter if the approach and final move vectors are greater than 60 degrees.

3. The maximum allowable feedrates for a series of short moves seems to be too aggressive – accel overlaps decel which creates a jerk in velocity. Steve is looking at the implications of what we found right now.

Marvin,

Since you weren't here for this, I think your critism [sic] is misbased. As is so often the case with everyone "the easiest thing in the world to do is to critisize" [sic]

Rich, I think correctly decided to use version 5 as a base to test a concept precisely because it was without many changes which could convolute the testing of a concept. No one is suggesting that version 6 will not be used in the final analysis. You and I both know that this and problems like it have plagued us for the last 2.5 years and

we have only been marginally able to improve the situation. I think a fresh approach is healthy and the 2 pronged approach with Steve working on the parser and Rich and Pat working where they have been is appropriate and I hope will yield results.

Let's all just stay focused and continue to collaberate [sic] to get an interim solution which is what we have been doing since you left.

Please no more Deeming or Fred Lewis for me, I just want something that works while we try to hold on to a few customers before you have a new platform to offer!

Dan

– Original Message –

From: Fallows, Steve

EXHIBIT 8

CRMS
CAROLINA REBUILD AND MACHINERY SALES
1681 TWO NOTCH ROAD
LEXINGTON, SC 29073 FAX

Bridgeport

To: ~~Rich Bailey~~
~~CC: Dick Bradbury~~
Marv Kreithen

From: ~~Carl Amick~~
Dan Morrissey

Date: 6/17/96

Number of Pages: 4
(including cover)
Phone: (803) 359-7000
Fax: (803) 359-6464

Remarks:

Rich:

One of our salesmen sent me a program that a current Bridgeport customer is running on a VMC 760/16. The program is a surface generated by cam software. There are moves of a few hundred-thousandths all along the surface. Running on the VMC, the maximum speed the program runs is about 30 ipm. Above this the sudden directional changes cause the machine to bump and shudder. By comparison, the customer's Fadal machining center has an automatic blending feature that allows this program to run (in aluminum) at 150 ipm. The customer's machining times goes from six hours to two. The customer will be purchasing another machining center

within the next two months. His comment to our salesman was "If you were in my position, which company would you buy a second machining center from?"

We've run into this problem before. On digitized parts you get similar results. The speed must be held back to get satisfactory results.

Ref the attached pages. These are the blending codes from the Fadal operator's guide. Does Bridgeport have a similar feature on the improved DX-32. If not, is a similar feature in the works for the future? Anything that we can give our salesmen would be a help at this point.

[Fax Signature]

EXHIBIT 9

Bridgeport Machines Inc.

Bridgeport Machines, Inc.
500 Lindley Street
Bridgeport, Connecticut 06606

Date: 7/2/96

To: Marvin Kreithen
From: Chuck Farrell
Subject: Dwell Marks

Marvin,

How is the dwell mark project going? As you may read from the attached, the customers are anxiously waiting for a reply from us.

In addition to the attached information, the Boston SSC has a customer with two 760 machines, that he wants to exchange for Heidenhain Machines.

Regards,
cc: M. LaMonica

EXHIBIT 10

Marvin Kreithen

From: Michael LaMonica
Sent: Tuesday, July 02, 1996 8:41 AM
To: Marvin Kreithen
Cc: Dan Griffith
Subject: VMC760 DX

We are once again faced with the possibility of taking back two more VMC760DX. The customer, Rapid Manufacturing, has (2) 412 VMC and (2) 760DX. He is able to achieve satisfactory machining on the 412 with the Heidenhain control. However running the same part on the 760DX results in rejection by their customer due to .0005 step in corners as a consequence of dwell related condition.

The customer is unwilling to live with this condition and wants it fixed or he wants the machines replaced with VMC760 Heidenhain machines.

Please advise asap

MSLjr

EXHIBIT 14

Bridgeport **C2187**

BRIDGEPORT MACHINES, INC.
500 Lindley Street
Bridgeport, CT 06606
Tel. 203/367-3651 fax. 203/335-0151

December 18, 1995

To: All full line Distributors and Sales Service Centers

From: Dick Bradbury, Director CNC Marketing

Subject: Release of the VMC 1000/22 DX Vertical Machining Center

Bridgeport Machines, Inc. is pleased to announce the release of the VMC 1000/22 DX controlled Vertical Machining Center. This machine will fill the growing demand for a rugged, low cost, 20 X 40" vertical machining center. The construction of this machine is identical to the Heidenhain and Fanuc controlled VMC 1000 machines with hardened and ground square ways and hand scrapped "Turcite" on every mating surface. The DX controlled 1000/22 features a 15 HP, duty rated, AC spindle motor and a 22 station automatic toolchanger which is quick and reliable. The individually molded tool holders in the tool magazine are designed to eliminate costly repairs to the carousel assembly. With axis travels of 40.2" x 20.1" x 20.", a BT-40 or CAT 40 spindle, 1220 IPM rapid traverse rates and the Bridgeport DX-32 control, this machine will provide the competitive specification and pricing you need to compete in the 2040 marketplace.

Marketing and sales support material, including stickers announcing the availability of the DX control for the VMC 1000 machine, are immediately available and we encourage your full use of these items. Requests for stickers for your literature inventory should be faxed to the Marketing Services Department. The current Bridgeport inventory of product sheets and color brochures for the VMC 1000 will have a DX-32 sticker attached and will be supplied in response to your orders until our inventory is exhausted and the materials are reprinted.

Product Literature & Video:

11042546 VMC 1000/22 Product Sheet.....N/C
11042709 VMC 760/1000/22 6 page Color Brochure.....N/C
11042704 Vertical Machining Center. Video incl. VMC 1000.....$4.00

A full machine quotation is also attached for your reference and the Bridgeport Bulletin Board has been updated with this new quote. The distributor margin on the VMC 1000/22 DX Machine and accessories will be as follows:

VMC 1000/22 DX.....12% net
All machine accessories.....15% net
Digitizing Software.....75% net

Production machines are currently scheduled to begin shipping this month. Please confirm machine delivery with our costumer service department before final acceptance of your customer order. If you have any questions, please don't hesitate call me.

Sincerely,

19 December 95

Bridgeport Machines is proud to offer for your consideration our VMC 1000/22 Bed-Type Vertical CNC Machining Center. This heavy duty machine offers a unique variety of performance features that provide the the [sic] means to efficiently meet the production demands that are typical in manufacturing today. This quotation presents the Bridgeport DX 32 controlled VMC 1000/22 machine.

The Bridgeport VMC 1000/22 Vertical CNC Machining Center is wired for 208/230/460V, 3-phase, 60 hz operation and includes a 15 HP 30 minute duty rated spindle motor with the Bridgeport DX 32 CNC Control as standard.

VMC 1000/22 Machine Specifications:

- Travels: X-axis 40.1" (1020mm)
  Y-axis 20.0" (510mm)
  Z-axis 19.7" (500mm)

- 15 hp, 30 minute duty rated, 12 hp, continuous, fan-cooled, AC motor with variable frequency drive;

- Spindle speed ranges of 40-4,000 or 60-6,000 rpm; Optional 100-10,000 rpm spindle is available.

- Poly-Vee belt direct drive spindle

- Rigid tapping on 4,000 and 6,000 rpm machines

- Sliding head design on a column fixed to a base, carrying a compound table arrangement with a load capacity of 1,980 lbs.

- All axes use bolt-on hardened and ground square steel ways with Turcite-B coated mating surfaces for low friction and high load carrying capacity
- AC Servo motors with separate encoders fitted to the ends of fully supported and pretensioned 32mm dia. ballscrews.
- High thrust to all axes: X and Y = 572 lbs
  Z = 1,971 lbs
- 1220 ipm rapid traverse rate X & Y: 787 ipm Z
- +/-.0002" positioning accuracy on all 3 axes
- +/-.00008" repeatability on all 3 axes
- BT-40 tooling with power drawbar
- 22 tool automatic tool changing magazine with 5.5 sec.tool change
- Flood coolant system with 4 jets at the spindle nose
- Automatic one-shot centralized lubrication system
- Low voltage worklight
- Probe Interface cabling
- Work area totally enclosed with interlocked sliding door access
- Machine requirements: 20 kva electrical supply
  80 psi compressed air
- 208/230V/460V, 3-phase, 60 hz multi-tap transformer

Control Specifications: (Bridgeport DX-32)

- DOS-based, IBM-compatible, 32-bit hardware incorporating BOSS (Bridgeport Operating System Software) software

- 500 data blocks/sec processing speed.
- 14" VGA color monitor with a 640 x 480 resolution and 16 colors
- 270 mb hard disk drive, and a 3½ inch, 1.44 mb floppy disk drive provide program storage of 1,750,000 and 12,000 feet of paper tape
- 2,000 ft. of Internal Ram part program storage
- Multiple part program storage with display of program comments
- Internal DNC-Link from either disk drive for execution of long part programs
- Manual data input mode with interactive dialog support
- Help screen for G-codes, M-codes, and Event Log
- Powerful canned cycles: 12 milling and 24 drilling
- 3-axis linear, and 2-axis circular interpolation in switchable planes, using rectangular or polar coordinates
- Helical interpolation, coordinate rotation, and XY mirror image
- Cutter comp. with automatic feedrate comp. & corner rounding
- Capable of storing up to 40 macros, and 4 levels of nested loops
- Parametric Part Programming Language with mathematical and logical operators for conditional branching
- Compatibility mode enables most features of BOSS 4-7.2 programs

- 2D/3D graphics preview for program verification
- Teach mode for programing while cutting the first piece
- One RS-232C serial port for communications
- One parallel port
- Real-time maintenance diagnostic monitor
- Probe Software cycles for machine setup and manual inspection
- Optional Digitizing software

Code No.	Description	List
13597490	VMC 1000/22 with Bridgeport DX 32 Control 6,000 rpm, 15hp,.....	$86,900.00

Machine Options:

24675101	High Torque spindle 40-4,000 rpm 15 hp.....	N/C
• 24675107	High Speed spindle 100-10,000 rpm.....	2,574.00
• 24675149	Cat-40 V-Flange spindle, installed.....	1,341.00
31943241	4th Rotary axis interface installed.....	1,500.00
• 24675213	CROMAR hinged belt slat type Chip conveyor, with L.H. exit....	9,215.00
• 24675113	Through-the-tool coolant system.. Requires the purchase of rotary coolant tool holder adapters from Kennametal.....	3,283.00 3,283.00

- The above machine options are Special Order Factory Installed Only

Control Options:

31944196 Enhanced performance option including:
N-See (3-D solid graphics) Windows/
Text editor Mouse/trackball..... 950.00

31943445 Ez-Digitize software including:
Digitizing cycles (G201-205),
Digitizing Manual..... 3,000.00

11900248 Renishaw MP11 probe kit including:
MP11 probe
30" coiled cable (stretches to 60")
MP11 users guide
MP11 storage box
Clamping screws
Tool Kit
1/2" dia. straight shank adapter
6mm dia., 50mm long, ceramic
stylus..... 3,345.00

NOTE: The TS-120 probe kit also requires option 31543031 for the DX-32

11682177 Heidenhain TS-120 probe kit including:
TS-120 probe
1 meter colied cable
5 mm dia. 47mm long, ruby stylus
3/4" dia straight shank adapter
TS-120 storage box
TS-120 users guide..... 2,900.00

31543031 TS-120 adapter cable for DX-32.....200.00

Probing and Digitizing Training, is a 1 1/2 day program that requires previous attendance in the Standard CNC Programming and Operating course as well as a basic understanding of Parametric Programming. The course will cover the following:

Basic Set-up, operation, and calibration of the probe; Standard probing capabilities in the machine executive; EZ-Digitize software, i.e. the G201- G205 digitizing cycles; Review of several examples which utilize the different cycles and routines..... $250.00

Note: This digitizing course is not intended to include the actual programming of a unique part. Technical support code numbers are listed below for individual customer support and/or programming.

11042505	Technical CNC Engineering Support/ Day.....	$288.00
31939849	Technical Cam Systems Support/ Day.....	$280.00

Miscellaneous Options:

31943242	9" dia Troyke Model NC-9 rotary table.....	6,200.00
31542658	8½" dia manual 3 jaw chuck.....	940.00
31542659	Manual tailstock for NC-9 table.....	885.00
11571050	Erickson 400B rigid clamp indexer kit incl: 6" dia 3-jaw chuck, T-slot face plate, and a manually operated tailstock...	6,484.00
11682161	H-29 BT-40 small tooling kit w/o tap holders.....	2,252.00
11682162	H-30 BT-40 tension/compression tapping kit.....	610.00
1168216	H-31 BT-40 direct drive tapping kit....	525.00
11685211	H-15 BT-40 tooling kit.....	5,458.00
24679924	Set of hold-down bolts, clamps & T-nuts.....	466.00
11680000	Kurt Plain D-60 vise.....	414.00
11680002	Kurt swivel base for D-60 vise.....	145.00
12530003	Bridgeport plain 6" vise.....	633.00
12530001	Bridgeport swivel 6" vise.....	789.00

One set manuals is included with each machine.

11042712	VMC 760/1000 Operating manual.....	91.00
11042638	DX-32 Programmers manual.....	61.00
11042744	Installation, Maintenance, & Parts manual.....	133.00

EXHIBIT 16

Bridgeport

BRIDGEPORT MACHINES, INC.
http://www.bpt.com

SERVICE BULLETIN

To: All Full-Line Dealers & Sales & Service Centers
Product: ALL DX 32 VMC
Subject: 6.86.1 SOFTWARE RELEASE

Number: 546 /s/ [Illegible]
11/13/97
Date: November 14, 1997
From: National Service

Bridgeport Machines, Inc. is pleased to announce the immediate release of enhanced software for the VMC DX-32 controlled machines. This software can be installed on any Torq-Cut 22 or 30 machine as well as all variations of the 760, 800, and 1000 DX controlled machining centers.

This version of software includes many new programming and operational features as well as additional block look-ahead capability and an advanced mathematical procedure (S-curve) for handling acceleration/deceleration. The combination of additional block look-ahead and the S-Curve algorithm will significantly improve 3D machining as well as improve surface finishes by eliminating axis dwell which can leave marks in the machined surface.

The following is a list of the new programming and operational features for the DX-32 control:

1) DLT Display (Distance Left to Travel)
The small XYZ position display on the right side of the operator screen has been modified to now display Distance Left to Travel.

2) S__T__M in JOG
The F1 key in the Job menus has been modified to incorporate the S__T__M function.

In Jog, when the F1 key is used, you now have the ability to enter a Spindle speed, Tool number or Miscellaneous function. This allows you the same functionality that you now have in the Basic Menu with the (6) S__T__M key.

3) SET X, Y, Z and/or C in Job
The (*) key has been added to allow setting of all 4 axes from the Jog menus. When this function is selected, the display will be prompt for the X,Y,Z & C axis position, just as in the F3 SETUP menu. The C axis will only appear if the axis has been installed.

4) Default Directories
The DX control, on power up, will now recognize the last directory that was used prior to the machine being powered down.

5) Additional Peck Clearance value
An additional peck clearance value has been added for use with all the peck drilling cycles. This is accessed by selecting the (1), Set Params key, in the STARTUP menu. When this function is selected an input field will appear. The additional peck clearance is added by typing the

following: pclr=value. 'Value' represents the new clearance distance the user would like the Z axis to rapid to relative to the last peck depth.

6) Variable Page

A variable page has been added to allow the user to input variables in addition to, or in place of those placed within the program. This is done in a file named VARS.TXT which resides in the C:/TXTFILES subdirectory. The file is then treated as Macro #100. Thus, when variables are needed in a program, the user would then call macro 100 (=#100) at the beginning of the program. Variable parameters can still be used as before, i.e., imbedding them directly in the program where they need to be used.

7) Additional Variables

The number of variables that can be used has been increased from 9 to 50 per alpha character listed. The alpha characters that can be used are X,Y,Z,C,R,D,A,I,J,K,F. The variables which are not mentioned above still can be used with up to 9 values.

8) Cutter Compensation

Cutter Compensation has been modified to execute changes in feedrate and Z depth properly. Prior software levels had ignored the change in feed and in Z depth.

9) New S curve servo algorithm

A new servo algorithm has been incorporated to enhance 3 dimensional machining capabilities. This new algorithm uses an 'S Curve' profile rather than the trapezoidal profile used in previous versions of software. The S curve was implemented to create a smoother acceleration and deceleration profile, thus improving performance in both

2D and 3D machining. This also eliminates the possibility for any marks in the part surface due to dwell of the axis drives.

Included with this bulletin you will find:

1. Two master disks of version 4.43/6.86.1. software, code number 12598550.

2. A programming/operation manual addendum, code number 11042932 for the new features included in the software.

3. Software update procedures for machines with flash disk memory

4. Software update procedures for machines with hard disk drive memory

Please Note! While the new software will enhance the machining characteristics and surface finish results of the machine during 2D and 3D machining, it is also critical that the machine is tuned properly and that all voltages are adjusted for compliance with the original factory settings as detailed in the procedures listed below. It is a combination of both the new software and a properly tuned and adjusted machine that will provide the results your customers expect. In addition, a new "MAKEDISK" utility has been incorporated in this software release. This will allow a back up copy of the executive software and parameters to be made on machines that were shipped in the past without an executable back-up disk. The procedure for making this back-up disk is as follows:

1. Insert a new floppy disk in the a: drive;

2. At the C: prompt, type in MAKEDISK

This will automatically create a complete back-up disk of the version of software that is installed on the machine.

Following is the recommended procedure for drive optimization, as set at the factory, for the Torq Cut 22/30 and VMC 760/800/1000.

VMC 760/800/1000 with DX-32 Control

1) Update the software per the instructions supplied with the software update package.

2) Insure that the KP and TN pots on the Siemens drive module are initially set to 3. (Turn full counter-clockwise to stop position; then clockwise three graduation marks – this will be at approximately the 7 o'clock position)

3) With the new S curve serve algorithm, it is possible that these pot settings will need to be modified slightly. The procedure is as follows:

1) Enable the axis drives

2) If any excessive nose (buzzing) is being generated by the axis drive motors, then the Kp pot for each respective drive should be adjusted until this condition is resolved. This is done by turning the adjusting screw counter-clockwise until the noise stops, then turn clockwise until it starts again and then back off slightly. Repeat on each axis until drives are quiet. Note! The KP adjustment MUST be as high as possible without causing noise. This adjustment is very sensitive.

3) Home the machine and now test the drive stability by jogging each of the machine axis at maximum traverse rate. If any noise still exists on any

axis, follow the previous step for adjusting the Kp pot on the applicable drive module.

TORQ CUT 22/30

1) Update the software per the instructions supplied with the software update package.

NOTE: The following voltage checks need to be performed and are very critical for the proper axis drive performance.

2) Enable the axis drives

Torq-Cut 22 Machines:

3a) With a digital Volt meter, check the DC voltage between wires #50 and #2 on the Axis Drive Power Supply output. This reading should be between 135-138 volts. If the Voltage is not within that range the T2 transformer will need to be re-tapped by moving wires 1 & 3 to taps 17 and/or 18 to achieve the desired results.

Torq-Cut 30 Machines:

3b) With a digital Volt meter, check the DC voltage between wires #50 and #2 on the Axis Drive Power Supply output. This reading should be between 144-146 volts. If the Voltage is not within that range the T2 transformer will need to be re-tapped by moving wires 1 & 3 to taps 17 and/or 18 to achieve the desired results.

4) Upon completion of step 3a or 3b, parameter #139 "PWM BUS VOLTAGE" should be checked to insure that the current voltage is recorded in that parameter correctly through the maintenance page

5) Insure "Z" axis motor cable is properly shielded by following the procedures in the service buletins [sic] listed below. Copies are attached for your reference.

Torq-Cut 22 = Service Bulletin 545
Torq-Cut 22 = Service Bulletin 544a

You may order additional copies of the enclosures and/or duplicate for distribution to your customers. If you have any questions, please do not hesitate to call for clarification.

(2)

No. 01-206

Supreme Court, U.S.
FILED
SEP 4 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN D. SZABO,

Petitioner,

v.

BRIDGEPORT MACHINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent, Bridgeport Machines, Inc., is a Delaware Corporation with its principal place of business in Bridgeport, Connecticut. It is a wholly-owned by Goldman Industrial Group, Inc.

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Bridgeport Machines, Inc. ("Bridgeport") respectfully opposes John D. Szabo, d/b/a Zatron's ("Szabo" or "Petitioner") Petition for a Writ of Certiorari ("Petition"). Szabo has not set forth compelling reasons for this Court to grant the Petition. First, the Petitioner has failed to show that this pre-judgment petition is "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Supreme Court Rule 11. Second, the question presented by the Petitioner is neither raised by the record below nor the Seventh Circuit's decision. Third, the Seventh Circuit's decision is not in conflict with the holding of another United States court of appeal on the same important matter. Finally, the Seventh Circuit's decision did not address an important question of federal law that should be addressed by this Court. In fact, the Seventh Circuit's decision completely comports with both the spirit and the letter of this Court's decisions in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) and *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). Therefore, the Petition should be denied.

PETITIONER HAS FAILED TO SHOW THAT HIS PRE-JUDGMENT PETITION IS OF IMPERATIVE PUBLIC IMPORTANCE

The Petitioner has failed to show that his pre-judgment petition "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Supreme Court Rule 11. Indeed, the Petitioner fails even to address this requirement. As set forth below, the Petition, which involves the legal standard by which a district judge reviews a motion for class certification pursuant to Fed. R. Civ. P. 23, does

not involve a matter of public importance, much less an imperative matter that requires the immediate, pre-judgment review of this Court. Indeed, the Seventh Circuit's decision vacated the district Court's order certifying this matter as a class action and remanded the matter for further proceedings. The district court has now set this matter down for a further hearing on class certification on April 8, 2002. Thus, it is likely that the district court will again address the class certification issue long before this proposed appeal could be heard. Accordingly, this matter is not presently ripe for consideration. *See, e.g., Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (recognizing that "[w]e generally await final judgment . . . before exercising our certiorari jurisdiction").

PETITIONER'S QUESTION PRESENTED IS NOT RAISED BY THE RECORD BELOW OR THE SEVENTH CIRCUIT'S DECISION

Neither the Seventh Circuit's decision, nor the record below, raise the question presented by the Petition. The Petitioner asks whether a District Court abuses "its discretion if it assumes that the substantive allegations of the complaint are accurate and does not conduct a preliminary inquiry to resolve factual disputes that relate to the merits of the claims" when it is "satisfied that it has a sufficient record to determine that the requirements for class treatment under Rule 23 of the Federal Rules of Civil Procedure have been met." Petition at i. This issue has little to do with the Seventh Circuit's decision and artfully avoids the principal issue that was presented on appeal.

The district judge, in this case, explicitly refused to consider Bridgeport's unrefuted evidence relating to

Fed. R. Civ. P. 23's ("Rule 23") mandatory requirements because it specifically found that "**this court must accept the substantive allegations of Szabo's complaint as true.**" Petitioner's Appendix ("Pet. App.") at 23 (emphasis added). Similarly, the district court refused to consider Bridgeport's evidence *relating to Rule 23's requirements* because it found that "**Bridgeport has inappropriately attempted to litigate the merits of Szabo's claims.**" *Id.* at 41 (emphasis added). Thus, the precise issue presented to the Seventh Circuit was whether the district court could ignore Bridgeport's evidence and accept all of the plaintiff's substantive allegations in determining whether Rule 23's requirements had been satisfied. It had nothing to do with the "sufficiency of the record" as Petitioner now claims.

In fact, the Seventh Circuit specifically addressed the issue of whether a district court *must* accept the substantive allegations of the complaint as true (including allegations relating to the Rule 23 factors) when deciding a motion for class certification where those facts are vehemently refuted and, additionally, whether a district court properly may refuse to consider factual information that *specifically relates to Rule 23's mandatory requirements* when those facts may also relate to the merits. The Seventh Circuit simply held that the district court applied the wrong legal standard in making the class determination.

Therefore, the question presented by the Petitioner does not stem from the facts or procedural history of this case as he suggests. Because the Seventh Circuit decided that the district court applied the wrong legal standard, it was not necessary for the Seventh Circuit to consider the sufficiency of the record. Thus, the question presented to the Seventh Circuit in Bridgeport's Petition for Permission to Appeal

Pursuant to Fed. R. Civ. P. 23(f) more accurately describes the district court's decision-making process in certifying this proposed class action:

> Did the District Court abuse its discretion in certifying this class action by accepting all of the plaintiff's unsupported factual allegations as true while refusing to consider Bridgeport's evidence?

As set forth below, the Seventh Circuit properly decided "yes" to this question. Bridgeport therefore respectfully urges this Honorable Court to deny the Petition.

FURTHER REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Decision is Consistent with this Court's Prior Decisions and is Not In Conflict with the Holding of Any United States Court of Appeals.

The Petitioner argues that the Seventh Circuit's decision below is in conflict with the holdings of several other United States courts of appeals. Specifically, the Petitioner claims that the Seventh Circuit's decision (which, he erroneously claims, "has directed district courts to make preliminary inquiries on the merits to resolve class issues") conflicts with the "holdings of several circuits directing district courts to assume the truth of the substantive allegations of the plaintiff's complaint in assessing whether class treatment is warranted." Petition at 20. This argument is without merit for the following reasons: (1) Szabo has mischaracterized the Seventh Circuit's holding; (2) the "holdings" of the other United States courts of appeals either do not stand for the proposition for which the Petition claims or are not valid law as they were decided prior to this Court's decision in

General Tel. Co. v. Falcon, 457 U.S. 147 (1982); and, most importantly, (3) the Seventh Circuit's decision is in complete harmony with this Honorable Court's previous decisions.

A. This Court Addressed the Appropriate Inquiry To Be Made In Determining Whether Rule 23 is Satisfied In Eisen And General Tel.

This Court addressed the appropriate inquiry to be made by a district court in deciding a Rule 23 motion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). The Seventh Circuit's determination is entirely consistent with these decisions.

In *Eisen*, this Court rejected the notion of allowing the district court to consider the likelihood of prevailing on the merits in determining whether a suit can be maintained as a class action. *Eisen*, 417 U.S. at 177. The *Eisen* court stated that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* The *Eisen* Court further quoted the following with approval: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.* at 178 (*quoting Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)).

This prohibition against denying class certification based on the relative strength or weakness of a case appears to be the original source for the district court's erroneous

conclusion in this matter that it could not consider evidence that in any way related to the merits. In rejecting the district court's findings, the Seventh Circuit's decision was not novel or alone. In fact, the conclusion that a district court is *not* bound by the allegations of the complaint when determining class certification is supported by this Court's decision in *General Tel.* and widely recognized by other courts. *See Castano v. The American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (finding that *Eisen* stands for the "unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision," and consequently does not limit the court from "looking beyond the pleadings"); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) (cautioning that *Eisen* "should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to make a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements"); *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) ("*Eisen* has not been interpreted so broadly, however, as to foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of plaintiff's particular individual claim"); *O'Neil v. Appel*, 165 F.R.D. 479, 496 (W.D. Mich. 1996) (finding that a court's refusal to undertake a "careful examination of the nature of plaintiffs' claims or the proof necessary to support them . . . is made possible only by a misreading of a single sentence in *Eisen*, coupled with a disregard of subsequent Supreme Court authority").

This Court's decision in *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), makes clear that a district

court is not bound by the plaintiff's allegations when it addresses whether Rule 23's requirements have been met. In *General Tel.*, this Court found erroneous the district court's assumption that the plaintiff's discrimination claim was typical of other claims. *General Tel.*, 457 U.S. at 158-59. In other words, by assuming typicality, the district court failed to "evaluate carefully the legitimacy" of the plaintiff's claim that he was a proper class representative. *Id.* at 160. The Court further elaborated on the type of inquiry that a district court must conduct when determining whether a proposed class meets Rule 23's requirements:

> *[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.* Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to *probe behind the pleadings* before coming to rest on the certification question. . . .

Id. (internal quotations and citations omitted) (emphasis added). This Court went on to state that a class certification order is "inherently tentative" because "actual, not presumed" conformance with Rule 23 remains "indispensable." *Id.* Finally, this Court admonished that a class action may be certified only "if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161 (emphasis added.)

The Petitioner here fails to recognize two important principles from *General Tel.* and, consequently, the Seventh

Circuit's decision. First, the *General Tel.* Court explicitly found (and, indeed, this Court had previously recognized) that the factual and legal issues that relate to the merits of a case may also relate to the factors for determining class certification under Rule 23; they are not mutually exclusive. Accordingly, the *General Tel.* Court explicitly endorsed "probing behind the pleadings" to ensure that Rule 23's requirements are actually met. Therefore, the *General Tel.* court approved a district court's inquiry, *beyond the allegations of the complaint*, into factual matters that relate to the Rule 23 factors, even if they also relate to the merits. This inquiry is, of course, separate and distinct from determining whether the plaintiff is likely to prevail on the merits of his claim, as is prohibited by *Eisen*.

B. The Seventh Circuit's Decision in this Case is In Complete Harmony with this Court's Decisions in Eisen and General Tel.

Regardless of whether any alleged "conflict" exists between the Seventh Circuit's decision and those of other circuits, the Seventh Circuit's decision is completely consistent with *Eisen* and *General Tel.* Thus, the Petition should not be granted. A further explanation of what the Seventh Circuit actually addressed and decided is necessary particularly in light of Szabo's mischaracterization of the Seventh Circuit's decision.

The Seventh Circuit simply decided that the district judge erred in accepting all of the plaintiff's substantive allegations as true and in refusing to consider facts relevant to class certification because they also related to the merits. In other words, the Seventh Circuit found that the district court erred in applying the same standard in determining

whether to certify this class as if deciding a Rule 12(b)(6) motion to dismiss. The Seventh Circuit recognized that there were many factual disputes below; it then observed:

> [t]here are other important disputes that we need not discuss, for the district judge handled all of them the same way: the judge assumed that whatever Szabo alleges must be true. [The judge proceeded] as if class certification under Rule 23 were governed by the same principles as evaluating the sufficiency of the complaint under Rule 12(b)(6). . . .

Pet. App. at 4. The Seventh Circuit quoted at length from the district court's opinion, citing to multiple, specific instances in which the district court identified factual and legal conflicts between the parties relating to Rule 23's requirements and then proceeded to reject, summarily, Bridgeport's attempt to contest plaintiff's class allegations. *Id.* at 4-5. The Seventh Circuit concluded: "[i]n sum, the district judge certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment. The judge stated that he had no other option." *Id.* at 5.

The Seventh Circuit then held that Rule 23 does not require that a district judge accept all of the complaint's allegations as true when deciding whether to certify a class action. *Id.* at 6. It found, rather, that "a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* The Seventh Circuit further found that the district court must make these inquiries (even if they relate to the merits) reasoning that a district judge makes similar inquiries when resolving disputes over jurisdiction and

venue. *Id.* at 8. The Seventh Circuit also specifically addressed this Court's decision in *Eisen* and, furthermore, the 1996 amendment to Rule 23, which placed the timing of the class certification decision ahead of the decision on the merits. *Id.* at 8-9. While the Seventh Circuit agreed that a court may not refuse to certify a class because it did not find a probability of success on the merits, it also found that:

> nothing in the 1966 amendments to Rule 23, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers. ***Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification.***

Id. at 9 (emphasis added). The Seventh Circuit furthermore found that the district court's approach was similar to the approach explicitly rejected by *General Tel. Id.* at 10.

With respect to the case at hand, the Seventh Circuit commented that "[n]agging issues of choice of law, commonality, and manageability beset this case" and "[n]ow that the district court is free to pierce the allegations of the complaint, it may find that these and other daunting obstacles good reasons to deny Szabo's request for class certification or certify a more limited class." *Id.* at 10, 11. It therefore remanded the case to the district court for proceedings consistent with its opinion.

Thus, the Seventh Circuit did not, as Szabo contends, "direct[] district courts to make preliminary inquiries into the merits to resolve class issues." Petition at 20. Nor is "the effect of the decision below . . . to call for a broad-ranging

inquiry into the evidence in nearly all class action cases." *Id.* at 19. Such a reading is a gross exaggeration and a transparent attempt to interest this Court. The district court's decision clearly shows that it felt bound to accept Szabo's substantive allegations as true, even where they were specifically controverted by Bridgeport's evidence and specifically related to the mandatory requirements of Rule 23. The Seventh Circuit found that this complete "hand-tying" was legally erroneous. The Seventh Circuit certainly did not issue a broad-reaching directive to district courts to conduct inquires into the merits of a case in determining class certification as suggested by Petitioner. It only found that "a judge should make whatever factual and legal inquiries are necessary under Rule 23." Pet. App. at 6. This statement is entirely consistent with and very similar to the above-quoted statements in *General Tel.*

Indeed, the Seventh Circuit's decision has recently been cited favorably by the Third Circuit in *Newton v. Merrill Lynch*, __ F.3d __, 2001 WL 877524 at *3-5 (3d Cir. Aug. 6, 2001) (affirming denial of class certification). Unlike the decisions to which the Petitioner refers, the *Newton* court, much like the Seventh Circuit, explicitly addressed the standard for reviewing a class certification motion after *General Tel.* The Third Circuit found, as Bridgeport argues here, that *Eisen*'s prohibition against conducting a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action "must be examined in context." In *Eisen*, the issue was whether the class representative was required to provide notice to class members. *Newton*, 2001 WL 877524 at *4. The Supreme Court affirmed the court of appeals' reversal of the district court's decision that the defendant should bear 90% of the cost of notice because the plaintiff was

"more than likely" to prevail on his claims. *Id.* The *Newton* court has similarly observed that this Court's decisions in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978), and *General Tel.* have allowed an inquiry into issues that relate to the merits when they also relate to Rule 23's mandatory requirements. *Id.* Finding that other courts, such as the Seventh Circuit, have agreed, the Third Circuit concluded:

> In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action. This is such an instance. We must probe beyond the surface of plaintiffs' allegations in performing our review to assess whether plaintiffs' securities claims satisfy Fed. R. Civ. P. 23's requirements.

Id. at *5 (footnote omitted). Thus, because the Seventh Circuit's decision is completely in line with this Court's decisions in *Eisen* and *General Tel.*, the Petition should not be granted.

C. The Seventh Circuit's Decision Does Not Conflict with any Valid "Holding" of the Second, Ninth or Tenth Circuit.

The Petitioner makes the astonishing claim that the Second, Ninth, and Tenth Circuits have held that the "district court should accept the substantive allegations of the complaint as true in assessing the propriety of class treatment." Petition at 20. The Petitioner cites the following cases for this proposition: a footnote in a Tenth Circuit Decision; a Ninth Circuit decision; and three footnotes in three circuit court decisions that were decided before *General Tel. Id.* Each will be addressed in turn.

First, however, and most importantly, the statement in *General Tel.*, which endorses "probing beyond the pleadings," and recognizes that the facts that relate to Rule 23's mandatory requirements often also relate to the merits, forecloses any possible reading of *Eisen* that mandates a strict adherence to the factual allegations of the complaint in determining a class certification motion. Therefore, those circuit court cases relied upon by Petitioner must be read and interpreted in light of *General Tel.* To the extent that these circuit court decisions conflict with *General Tel.*, they are not valid law and cannot be relied upon by the Petitioner as a source for a valid "conflict" with the Seventh Circuit's decision.

A review of the cases that Petitioner cites as amounting to a "conflict" with the Seventh Circuit's decision is necessary. Although this is somewhat of a tedious exercise, a careful review of what these cases actually say; the context in which they were decided; when they were decided; and the cases upon which they, in turn, rely show that none of these courts have squarely held that a district court must accept the facts alleged in the complaint as true when they relate to Rule 23 requirements. To the extent that they contain dicta that indicates otherwise, they are not in accordance with *General Tel.* and do not amount to a "conflict" with the Seventh Circuit's decision in this case.

The Petitioner first cites to *J.B. v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999). Petition at 20, 21. In that case, the Tenth Circuit affirmed the denial of class certification because the plaintiffs failed to show commonality. *J.B.*, 186 F.3d at 1289. In footnote seven, the Tenth Circuit stated:

> We recognize that, when deciding a motion for class certification, the district court *should* accept

> the allegations contained in the complaint as true. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978); Newberg & Conte, *supra*, at § 7.26. However, it "need not blindly rely on conclusory allegations which parrot Rule 23 requirements [and] may . . . consider the legal and factual issues presented by plaintiff's complaints." Newberg & Conte, *supra*, at § 7.26 (citing cases).

Id. (emphasis added). This footnote does not support Petitioner's claim of a "conflict."

The first sentence simply confirms the holding in *Eisen*, *i.e.*, that the merits of the claim cannot influence the class determination. It is important to note that the footnote goes on to state that the court may consider the legal and factual issues presented by the complaint. It obviously does not require the district court to blindly accept the complaint's allegations as true. Indeed, in *J.B.*, the Tenth Circuit *affirmed the denial of class certification*, which presumably would not have occurred if the district court were required to accept all allegations as true.[1]

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1. *J.B.* also relies on *Newberg on Class Actions*. Newberg recognizes, in the section relied upon, that there are different standards to be applied in deciding whether to certify a class based on the nature of the facts, and whether they are disputed, in each particular case. In other words, some cases are appropriately decided on the pleadings; some on affidavits (as was proposed by Bridgeport in this case); and others only after an evidentiary hearing. With respect to ruling on the pleadings, Newberg cautions that:

(Cont'd)

The Petitioner also cites *In re Coordinated Pretrial Proceedings in Petroleum Prods. Litig.*, 691 F.2d 1335, 1342

(Cont'd)

> For a class ruling based on pleadings and briefs only, argument made on legal conclusions and presumptions from class facts *which are undisputed* in the usual case is involved, and burden of proof concepts are not of significance beyond the prima facie showing of such class facts. When deciding a motion for class certification, the court should accept the allegations in the complaint as true, but need not blindly rely on conclusory allegations which parrot Rule 23 requirements. Courts may also consider the legal and factual issues presented by plaintiff's complaint.

Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, 3d Ed. 1992, § 7.26 at 7-84 – 7-85 (footnotes omitted) (emphasis added). Thus, Newberg clearly recognizes that this standard of review is appropriate only when the class facts *are undisputed*; even so, courts may still consider the legal and factual issues presented by the complaint.

Newberg also recognizes that when factual affidavits are filed that "dispute the class facts alleged in pleadings of the class representative, the burden may be shifted back to the class representative to file counter-affidavits, if appropriate, in order to overcome the general rule that facts in an undisputed affidavit must be taken as true, unless rebutted, for purposes of rulings on preliminary motions." *Id.* at 7-85 – 7-86 (footnote omitted). This is precisely what Bridgeport did at the district court level: it submitted several factual affidavits that challenged Szabo's class facts. *Szabo, however, did not rebut or dispute Bridgeport's evidence.* Therefore, Szabo failed to meet his burden at the district court level.

Finally, Newberg recognizes that

> [c]lass facts may be developed or rebutted during the course of a collateral evidentiary hearing, such as a hearing

(Cont'd)

(9th Cir. 1992) as a source of "conflict." Petition at 20, 21. In this case, the Ninth Circuit stated:

> Although in determining whether to certify the class, the district court is bound to take the substantive allegations of the complaint as true, *Blackie v. Barrack*, 524 F.2d 891, 901 n.7 (9th Cir. 1975), *cert. denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976), **the court also is required to consider the nature and range of proof necessary to establish those allegations.** *Id.* at 901.

In re Coordinated Pretrial Proceedings, 691 F.2d at 1342 (emphasis added). Again, as in *J.B.*, the court in *In re Coordinated Pretrial Proceedings* affirmed the district court's denial of class certification. Because the above-quoted sentence specifically states that the court is required to consider the nature and range of proof necessary to establish the allegations of the complaint, it too does not

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(Cont'd)

> on a preliminary or permanent injunction which precedes the class ruling, or during a special *evidentiary hearing to determine class facts*. Oral testimony at any evidentiary hearing prior to the class ruling prior to the class ruling which disputes class facts alleged in the complaint will require counter oral testimony or other evidence to rebut the new facts.

Id. at 7-87 (footnotes omitted). Clearly, therefore, Newberg recognizes that evidence via either affidavit or oral testimony that disputes class facts alleged in the complaint *shifts the burden to the plaintiff* to overcome the evidence. The allegations in the complaint are not the final word on class issues, as vehemently argued by Petitioner.

stand for the proposition that a court must blindly accept as true the complaint's allegations relating to the Rule 23 factors, as urged by Petitioner.

The Petitioner also cites to a footnote in *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (1975), a case decided well before *General Tel.* Petition at 20. In this footnote, the Ninth Circuit stated that:

> The court is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations. While the court may not put the plaintiff to preliminary proof of his claim, it does require sufficient information to form a reasonable judgment. Lacking that, the court may request the parties to supplement the pleadings with sufficient material to allow an informed judgment on each of the Rule's requirements.

Blackie, 524 F.2d at 901 n.17. The Ninth Circuit, affirming the class certification order in that case, found that the judge had sufficient material, *other than the complaint*, before him in order to form a reasonable judgment on each of Rule 23's requirements and determined that the requirements were met. *Id.* at 900-01. In so finding, the Ninth Circuit explained that "[s]o long as [the district judge] has **sufficient material before him to determine the nature of the allegations, and rule on compliance with the Rule's requirements, and he bases his ruling on that material,** his approach cannot be faulted because plaintiff's proof may fail at trial." *Id.* at 901

(emphasis added). Thus, it is clear that the Ninth Circuit properly understood the limited nature of *Eisen*'s prohibition against requiring a plaintiff to show likelihood of success on the merits of his or her claims in determining whether to certify the class. It is also clear that the Ninth Circuit did *not* endorse the approach of accepting the plaintiff's allegations at face value. Indeed, the Ninth Circuit has since stated explicitly that "we are at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (*quoting In re Unioil Sec. Litig.*, 107 F.R.D. 615, 618 (C.D. Cal. 1985)) (internal quotation marks omitted).

Finally, the Petitioner relies on two footnotes in two other pre-*General Tel.* cases from the Second Circuit: *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 660 n.15 (2d Cir. 1978) and *Green v. Wolf Corp.*, 406 F.2d 291, 294 n.1 (2d Cir. 1968) Petition at 20, 21. In *Shelter Realty Corp.*, the Second Circuit refused to consider the defendant's interlocutory appeal of an order granting class certification under the then-applicable standards for appellate review of class certification decisions. Therefore, the Second Circuit never reached the merits of the appeal. Nevertheless, in footnote fifteen, the footnote relied upon by Petitioner for a "holding" that "conflicts" with the Seventh Circuit's decision in this case, the Second Circuit stated:

> As to appellants' argument that the trial court should not have decided the class motion on the basis of the complaint, we simply note that Judge Frankel was prohibited from conducting an inquiry into the merits by the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94

> S.Ct. 2140, 40 L.Ed.2d 732 (1974) (Eisen IV); that he did consider the criminal information and numerous affidavits and documents relating to the class issues; and that we have previously held that it is proper to accept the complaint allegations as true in a class certification motion. *See Shayne v. Madison Square Garden Corp.*, 491 F.2d [397], 398 [2d Cir. 1974]; *Green v. Wolf Corp.*, 406 F.2d 291, 294 n.1 (2d Cir. 1968), *cert denied*, 395 U.S. 977, 89 S.Ct. 2131, 23 L.E.2d 766 (1969).

Shelter Realty Corp., 574 F.2d at 660 n.15. Although this footnote appears, at first blush, to reveal the source of the Petitioner's claimed "conflict" with the Seventh Circuit's decision, it certainly itself does not amount to a holding. Indeed, the appeal was not accepted. Moreover, a review of the two cases cited in footnote fifteen shows that they do not support such a holding.

In the *Shayne* case, the Second Circuit again dismissed an interlocutory appeal denying class certification and therefore did not address the propriety of the class certification ruling. In deciding whether interlocutory review was proper, it simply commented that "[s]ince this litigation is still in the pre-trial stage, the facts will be taken as alleged in the complaint or as they appear without dispute in the record before us." *Shayne*, 491 F.2d at 398. Thus, the *Shayne* case does not hold that a district court must accept the complaint's allegations as true when deciding a motion for class certification pursuant to Rule 23. To the extent it can be construed otherwise, it conflicts with *General Tel.*

Similarly, in the *Green* case, which was decided before both *Eisen* and *General Tel.*, the pertinent footnote relied upon by Petitioner and cited by *Shelter Realty Corp.*, states that:

> We have assumed for the purpose of this appeal, as we are required to do, that the "facts" stated in the complaint and accompanying papers submitted to Judge Ryan are true. No such finding, of course, is to be inferred.

Green, 406 F.2d at 294 n.1. Again, this cursory footnote does not amount to a holding. Furthermore, the "facts" presumed in that case included not simply the complaint, but other "papers" submitted to the judge, as opposed to the district judge's refusal to consider any of Bridgeport's facts in this case. Finally, because any reliance on *Green* as precedent is foreclosed by *General Tel.*, this footnote cannot amount to a holding that is in conflict with the Seventh Circuit's decision. Therefore, the Petition must be denied.

II. Whether an Evidentiary Hearing Was Required Was Not an Issue Below. Furthermore, There is No Existing Split Among the Courts of Appeal Regarding the Extent to Which an Evidentiary Hearing Regarding Class Certification is Warranted.

The Petitioner further claims that "[g]ranting the writ will give this Court an opportunity to resolve an existing split among the courts of appeals on the extent to which an evidentiary hearing is required in determining whether class treatment is warranted." Petition at 22. This argument does not present an issue meriting review for two reasons: first, this issue is neither addressed by the Petitioner's question

presented, nor does it arise from the facts and procedural history of this case; and second, there is no meaningful split among the courts of appeals regarding this issue.

Whether or not an evidentiary hearing should have been conducted was not squarely addressed below. Although the Petitioner claims that the need for an evidentiary hearing is "directly implicated" by the Seventh Circuit's decision and that the decision somehow "effectively creates a universal hearing requirement," the issue of an evidentiary hearing was never mentioned in the Seventh Circuit's decision. *See* Petition at 23, 24. Moreover, nowhere in Bridgeport's Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) did Bridgeport even mention an evidentiary hearing.

Indeed, the notion of an evidentiary hearing was not raised in this case until after the district court initially granted class certification and Bridgeport asked the district court to reconsider its decision. Bridgeport repeatedly argued (and the Seventh Circuit later agreed) that the district judge was required to consider Bridgeport's evidence relating to the plaintiff's ability to prove compliance with Rule 23's mandatory requirements. Memorandum of Law in Support of Motion for Reconsideration, pp. 2-9. In support of its argument that the district court should have considered the evidence it proffered relating to Rule 23's mandatory requirements, Bridgeport pointed to the *Manual of Complex Litigation* and the many circuit court decisions that have found that an evidentiary hearing on class certification is appropriate where class facts are disputed. Memorandum of Law in Support of Motion for Reconsideration, p. 10. Bridgeport then recited the numerous instances in which the district court ignored Bridgeport's unrefuted evidence (via affidavit and Petitioner's own deposition transcript) that showed the Rule 23's requirements had not been met. Memorandum of Law in

Support of Motion for Reconsideration, pp. 13-15. Although Bridgeport's position has always been that its uncontroverted evidence unequivocally shows that Rule 23's requirements were not met and, thus, class certification should have been denied,[2] Bridgeport stated that if the court, *upon reconsideration*, found that there were factual disputes regarding Rule 23's requirements (the court's position on which was unknown since it explicitly refused to consider Bridgeport's facts), it should then hold an evidentiary hearing. Bridgeport then requested that the district court reconsider its decision and either "deny class certification on the record presently before it; or, set this matter down for an evidentiary hearing to 'probe' the underlying facts regarding whether plaintiff can satisfy the requirements of Rule 23." Memorandum of Law in Support of Motion for Reconsideration, p. 20. Therefore, the district court's conclusion that Bridgeport contended that the court "should have conducted an evidentiary hearing on the motion for class certification" is not accurate.

Quite simply, this Petition has nothing to do with whether an evidentiary hearing should have been held, since, as the Seventh Circuit noted, the district court erred by accepting all of the complaint's allegations as true and in refusing to consider any of Bridgeport's evidence that related to Rule 23's requirements. Under that erroneous legal standard, an evidentiary hearing would never be required.[3]

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2. Indeed, Newburg apparently agrees with this position. *See supra* n.1.

3. After the Seventh Circuit's decision, however, the district court ordered that an evidentiary hearing on the issue of class certification will be held in April, 2002.

Additionally, the Petition should not be granted because there is no "existing split on the extent to which an evidentiary hearing is required in determining whether class treatment is warranted." Petition at 22. The Petitioner claims that there are three distinct "approaches" among the circuits as to when an evidentiary hearing on class certification is appropriate. *Id.* at 23. A review of Petitioner's argument, on its face, shows that these different "approaches" hardly amount to a conflict among the circuits. The most that can be said about these subtle distinctions is that two circuit courts of appeal recommend more strongly than others that a evidentiary hearing occur before a class certification motion is decided. Indeed, no court of appeal mandates that an evidentiary hearing be conducted. Thus, there is no true "conflict" among the circuits and this "issue" does not merit this Court's review.

Again, the Petition, on its face, does not suggest otherwise. The Petitioner first cites to a Second Circuit decision which states that an evidentiary hearing is required if the district court is inclined to *deny* class treatment. Petition at 23. Clearly, the district court here was not inclined to deny class treatment. Thus, this is hardly a split of authority. More importantly, however, the Second Circuit clearly stated that "evidentiary hearings are not mandated in every Rule 23 case." *Marcera v. Chinlund*, 565 F.2d 253, 255 (2d Cir. 1977), *vacated on other grounds sub nom Lombard v. Marcera*, 442 U.S. 915 (1979).

The Fifth and Eleventh Circuits recommend that an evidentiary hearing take place on class certification in most cases. Again, however, they do not mandate an evidentiary hearing in all instances. *See, e.g., Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986) (stating

that district court should ordinarily conduct evidentiary hearing on class certification); *Morrison v. Booth*, 730 F.2d 642, 644 (11th Cir. 1984) (same).

The Petitioner states that the remaining circuits have "left the matter to the sound discretion of the district court." Petition at 23. The remaining circuits, far from remaining neutral on this topic, however, have also specifically recommended that district courts hold evidentiary hearings, particularly when there are factual disputes relating to class certification. For example, in one case cited by the Petitioner, the Fourth Circuit stated:

> It is seldom, if ever, possible to resolve class representation questions from the pleadings, and where facts developed during discovery proceedings are inadequate, an evidentiary hearing should be held on the request of the parties or, if necessary for a meaningful inquiry into the requisites of Rule 23, by the court sua sponte.

International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1268 (4th Cir. 1981) ("We have often emphasized the value of[,] . . . where the pleadings and discovery leave doubt as to the propriety of certification, the need for an evidentiary hearing on the question"); *see also, e.g.*, *Fink v. National Sav. and Trust Co.*, 772 F.2d 951, 960 (D.C. Cir. 1985) (criticizing district court for not holding hearing on class certification issues and noting that review was rendered impossible due to such failure). Therefore, in light of the recognized value of an evidentiary hearing when there are disputed issues of fact with respect to Rule 23's requirements, there can hardly be said to be a "conflict" among the circuits that more strongly recommend a hearing and those that only encourage it.

In fact, rather than supporting the Petition, the circuit courts' favoring of evidentiary hearings on Rule 23 motions is further indication that the Seventh Circuit correctly vacated the district court's order certifying the class in this matter. If the district court were correct in completely accepting all of the plaintiff's allegations as true and ignoring contrary evidence regarding Rule 23's factors, class certification hearings would largely be irrelevant. Plaintiffs' counsel would simply craft artful pleadings that show facial compliance with Rule 23's requirements.

PETITIONER MISSTATES FACTS IN HIS STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, Bridgeport has identified below misstatements of fact contained in the Petition that bear on the issues that properly would be before this court if certiorari were granted. Petitioner makes several inaccurate statements in his Statement of the Case. First, Szabo claims that he could not operate Bridgeport's machine "at speeds consistent with Bridgeport's specifications without producing parts with a poor finish that resulted from dwell marks." Petition at 2. Szabo, however, specifically acknowledged in his deposition that the machine performs properly and within specifications for his present workload. Szabo Depo. at 169.

Second, the Petitioner claims that his complaint is premised only on the following written documents: a brochure he received before purchasing the machine, and the form contract furnished by the distributor, and "not oral statements." Petition at 3. Similarly, Szabo contends that the Seventh Circuit "misspoke" regarding the issue of reliance on "oral" versus "written" representations because

"Bridgeport's written representations, not oral statements, formed the basis of his suit." Petition at 15 n.8.

Notwithstanding Petitioner's assertions, it is clear from both Szabo's Amended Complaint and his deposition testimony, that his claim is dependent upon *both* the alleged oral representations made to him by the Bridgeport Distributor, Advance Machinery Company, Inc. ("Advance Machinery"), as well as the written materials. Indeed, Petitioner alleges in his Amended Complaint that:

> In April 1997, plaintiff had various conversations with representatives of Bridgeport in an effort to determine whether the Company's vertical machining centers would be adequate to perform 3-D mold work. Ultimately, in April 1997, plaintiff had a telephone conversation with Steve Meussling, a sales engineer employed by Advance Machinery Company, Inc. ("Advance Machinery"), Bridgeport's agent and distributor in the State of Indiana, in which Meussling assured Zatron that the VMC 800 was suitable to perform 3-D mold work.

Amended Complaint, ¶ 31. Plaintiff further admitted in his deposition, that the machine's brochure does not explicitly mention 3-D machining. Szabo Depo at 109. He further acknowledged that his decision to purchase the machine was based on the oral representations of the Advance Machinery salesmen, which included "in depth discussions" regarding the machine's ability to perform complex 3-D work. Szabo Depo at 86-94. Szabo also attended a demonstration of the machine at Advance Machinery's showroom and decided to purchase the machine after this demonstration

and conversations with Mr. Meussling. Szabo depo at 87, 92. Therefore, it is clear that Szabo's decision to purchase the machine, and his understanding of its capabilities, was based on a variety of important factors only one of which was the review of the written brochure. This is an important distinction particularly because Petitioner has acknowledged in his deposition that the machine performs within specifications for less complex work.

Bridgeport emphasizes, however, that the Seventh Circuit did not determine these or any other of the many factual and legal disputes regarding Szabo's inability to meet Rule 23's requirements. Again, the Seventh Circuit's decision addressed the legal standard of review to be applied when considering a class certification motion. The facts supporting as well as weighing against compliance with Rule 23's requirements are not at issue before this Court.

CONCLUSION

For all of the foregoing reasons, Bridgeport respectfully requests that this Honorable Court deny the Petition.

Respectfully Submitted,

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In The

Supreme Court of the United States

JOHN D. SZABO, doing business as ZATRON, on behalf of himself and all others similarly situated,

Petitioner,

v.

BRIDGEPORT MACHINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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I.

REVIEW SHOULD BE EXERCISED NOW.

Bridgeport first asserts that Mr. Szabo has not set forth compelling reasons for this Court to grant the Petition and that it consequently fails to satisfy Supreme Court Rule 11. (Brief in Opp. at 1). Rule 11, however, is simply not applicable: the Seventh Circuit has already ruled, vacating the class certification decision and remanding the case to the district court. Thus, Mr. Szabo is not seeking review of "a case pending in a United States court of appeals, before judgment is entered in that court." S. Ct. R. 11.[1]

Bridgeport also argues that this case is not ripe for consideration because it was remanded to the district court. (Brief in Opp. at 2). This Court has indicated that it normally will not review decisions of the lower courts prior to final judgment,[2] but that principle is not absolute. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Instead, "where there is an important and clear-cut issue of law that is fundamental to the further

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[1] Rule 11 is instead intended for cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952), in which certiorari is sought after an appeal has been docketed, but before the court of appeals has rendered a decision. *See generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* at 199 (7th ed. 1993).

[2] *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967); *see also Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

conduct of the case, and that would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review." *Randolph Central School Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting from denial of certiorari).

Consequently, neither the remand by the court of appeals nor the bench trial scheduled by the trial court precludes review of the question presented. In *Land* and *Larson*, the procedural posture was similar. There, the Court granted certiorari to review decisions raising important jurisdictional questions, where the court of appeals had reversed the granting of a motion to dismiss and had ordered the case remanded for trial. *Land*, 330 U.S. at 734; *Larson*, 337 U.S. at 685. In *General Motors Corp.*, the case had been remanded for trial by the court of appeals. Nevertheless, this Court granted certiorari, as the circuit court ruling was "fundamental to the further conduct of the case." 323 U.S. at 377. In *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959), this Court granted review where a court of appeals refused to issue a writ of mandamus that would have required the district court to hold a jury trial.[3] *Id.* at 501; *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 380-81 (1970) (review granted prior to trial to consider whether court of appeals misapplied prior Supreme Court precedent).

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 159 (1974), a decision implicated by the question presented, this Court granted certiorari to address "difficulties" that

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[3] (*See* Pet. at 26-27) (discussing the impact of the Seventh Circuit's decision in this case on the right to a jury trial).

had arisen in the application of Rule 23, although the action had not yet reached the stage where a final judgment on the merits had been entered. Therefore, certiorari has been granted where a case presented a novel and important question of law and where the petitioner's position, if sustained, would render the decision wholly void. *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893).

Here, the question presented is fundamental to the further conduct of this case. The class certification bench trial has been scheduled because the court of appeals directed the district court to resolve disputed factual issues relating to the merits of Mr. Szabo's claims if those issues are also relevant to Rule 23's criteria. (App. at 7-8). If the court of appeals improperly vacated the district court's class certification order, than the bench trial that the court has scheduled is unnecessary. The question presented is not only fundamental to the further conduct of the case, it is appropriate for certiorari, because of existing conflicts among the courts of appeals and because of its importance to judicial administration. (Pet. at 16-27).

And if this Court does not grant review now, there is a substantial risk that the propriety of the Seventh Circuit's decision will escape review: Once the district court conducts the bench trial, the focus of any subsequent appellate review will necessarily shift to whether it properly applied Rule 23's criteria to the evidentiary record before it, not whether it abused its discretion in the original class certification decision.

II.

THE QUESTION PRESENTED IS RAISED BY THE DECISION OF THE COURT OF APPEALS.

Bridgeport insists that Mr. Szabo is raising a question that is not presented by the record or the Seventh Circuit's decision, asserting that the real issue is the trial court's refusal to consider Bridgeport's evidence. (Brief in Opp. at 2-4). This contention distorts the record. The trial judge plainly considered Bridgeport's contentions and its evidence. (App. at 59-60 n.2). The court simply refused to give Bridgeport's assertions the dispositive weight that defendant sought. (App. at 60) ("Moreover, in many instances where Bridgeport claims that the court must accept its version of the facts as true, the facts were not relevant to the issue."). And while Bridgeport asserts that its evidence was not refuted, the record demonstrates that plaintiff submitted contrary evidence, including evidence that Mr. Szabo relied on Bridgeport's written representations in its brochure and in the written contract. (*See* Pet. at 6-7, 12-13 n.6). The record also shows that Mr. Szabo challenged the competency of Bridgeport's evidence. (*See* Pet. at 4, 13 n.7).

III.

THE QUESTION PRESENTED IS APPROPRIATE FOR REVIEW.

Bridgeport also asserts that the decision below does not conflict with any decision of this Court or any court of appeals. To sustain this contention, Bridgeport labors to show that the Second, Ninth and Tenth Circuits have not held that district courts should accept the substantive

allegations of the complaint in ruling on class certification motions. A cursory examination of district court opinions shows Bridgeport to be in error. *See Weil v. The Long Island Savings Bank*, 200 F.R.D. 164, 168 (E.D.N.Y. 2001) ("When applying Rule 23, courts should accept all allegations in the complaint as true."); *O'Connor v. Boeing North American, Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000) (noting Ninth Circuit precedent directing that the substantive allegations of the complaint be accepted in ruling on a class certification motion).

Moreover, even in cases where district courts exercise their discretion to treat class issues on a highly developed evidentiary record, precedent from other circuits directs that they avoid reaching ultimate issues of fact that relate to the merits. *See Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 293 (CA2 1999) (district court's refusal to grant class certification was error as it improperly decided to credit defendant's evidence over plaintiffs' evidence).

The Third Circuit's recent decision of *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 2001 U.S. App. LEXIS 17424 (CA3 2001), which Bridgeport cites, is similar. In *Newton*, the inquiry into the merits involved an evaluation of how the case would be presented, not a resolution of disputed factual issues that related to the merits. The *Newton* Court refused to address the ultimate merits of reliance issues, despite evidence that there was some public disclosure of the deceptive business practices that were at issue. 2001 U.S. App. LEXIS 17424 at *41-*44. The Third Circuit affirmed the denial of class certification in *Newton* because it concluded that millions of securities trades would need to be

evaluated individually to determine whether a class member had suffered any injury. 2001 U.S. App. LEXIS 17424 at *85.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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